No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

CONNIE SUE VALVERDE JONES, *et al.*,

Petitioners,

vs.

LUHR BROS. INCORPORATED,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. The district court credited the testimony of Petitioners' expert as to how a maritime collision occurred. The court of appeals overturned the district court's findings and rejected the expert's opinions, even though the expert's testimony was admitted without objection. Does the failure to challenge an expert's opinions through a *Daubert* objection waive sufficiency of the evidence complaints turning on the reliability of that expert's opinions?

II. In reviewing the district court's fact-findings for clear error, the court of appeals included "the testimony of independent witnesses" as a factor to be considered in reviewing the district court's credibility determinations. In making its findings of fact following a bench trial, is the district court required to give extra weight to the testimony of "independent" witnesses?

III. Did the court of appeals abandon the deferential "clearly erroneous" standard of review applicable to a district court's fact-findings and improperly substitute its own credibility determinations for those of the district court?

LIST OF PARTIES

The Petitioners are:

Connie Sue Valverde Jones, Individually and as Representative of the Estate of Matthew Marvin Shepp, Deceased;

William Coon;

Audrey Jerome, Individually and as Independent Executrix of the Estate of Allen Jerome, Deceased; and

Barre Shepp, Individually and as Personal Representative of the Estate of Matthew Marvin Shepp, Deceased.

The Respondent is:

Luhr Bros. Incorporated.

TABLE OF CONTENTS

Page

Questions Presented For Review i

List of Parties ii

Table of Contents iii

Table of Authorities iv

Opinions Below 1

Statement of the Basis of the Jurisdiction of the Supreme Court 1

Statement of the Case 1

Argument 4

I. THE FAILURE TO RAISE A *DAUBERT* OBJECTION TO EXPERT TESTIMONY WAIVES ANY SUFFICIENCY OF THE EVIDENCE COMPLAINTS ABOUT THE RELIABILITY OF THE EVIDENCE 4

II. THE DISTRICT COURT IS NOT REQUIRED TO AFFORD EXTRA WEIGHT TO A WITNESS'S TESTIMONY MERELY BECAUSE THE WITNESS IS "INDEPENDENT" OF THE PARTIES 7

III. THE COURT OF APPEALS IMPROPERLY SUBSTITUTED ITS OWN FINDINGS OF FACT FOR THOSE OF THE DISTRICT COURT 8

Conclusion 21

Appendix

Opinion of the Court of Appeals ..... App. 1

Findings of Fact and Conclusions of Law of the District Court ..... App. 26

Judgment of the Court of Appeals ..... App. 52

Judgment of the District Court ..... App. 54

Order denying Motion for Panel Rehearing ..... App. 58

TABLE OF AUTHORITIES

Page

CASES CITED:

Anderson v. City of Bessemer City, 470 U.S. 564 (1985) ..... *passim*

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) 5, 6

Marbled Murrelet v. Babbit, 83 F.3d 1060 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 942 (1997) 5, 6

STATUTES CITED:

28 U.S.C. § 1254 1

28 U.S.C. § 1333 1

OTHER AUTHORITIES CITED:

22 CHARLES ALAN WRIGHT & KENNETH A. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5168.1 (1998 Supp.) 5

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, set forth in the Appendix beginning at App. 1, is reported as *Complaint of Luhr Bros., Inc.*, 157 F.3d 333 (5th Cir. 1998). The Findings of Fact and Conclusions of Law of the District Court, set forth in the Appendix beginning at App. 26, was not reported.

STATEMENT OF THE BASIS OF THE JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. § 1254. The United States Court of Appeals for the Fifth Circuit issued its Opinion in this case on September 30, 1998. Panel Rehearing was timely requested. Rehearing was denied on November 4, 1998. See App. 58-59. This Petition was timely filed within 90 days of the panel rehearing denial, and is timely.

STATEMENT OF THE CASE

This is a maritime collision case within the district court's original jurisdiction pursuant to 28 U.S.C. § 1333. The Respondent, Luhr Bros., Inc., ("Luhr") is the owner and operator of the M/V THE ADMIRAL, a tug whose six-barge tow[1] ran over the shrimp boat F/V AUDREY,

[1] The ADMIRAL was pushing a tow of six barges, three barges long and two abreast. Although the barges in a flotilla such as the ADMIRAL's are pushed rather than towed, they are still referred to as the "tow."

killing two occupants of the AUDREY and injuring two others. The surviving occupants of the AUDREY and the representatives and survivors of those who died are the Petitioners herein. Following a bench trial, the district court denied Luhr's Petition for Limitation of Liability, found that Luhr was responsible for the accident, and awarded the Petitioners damages totaling $4,397,308.37. On appeal, the Fifth Circuit substituted its judgment for that of the trial court and determined that the action of the AUDREY was the sole proximate cause of the collision. The Fifth Circuit reversed the judgment of the district court, and rendered judgment for Luhr.

On the day the accident occurred, the AUDREY was on a pleasure fishing trip. On board the AUDREY were Allen Jerome, William Coon, Connie Jones and her 7-year-old son, Matthew Shepp.

THE ADMIRAL, a 120 foot long inland river push-boat, was pushing a string of six flat-deck barges, each 195 feet long and 35 feet wide, made up two abreast. The barges were fully loaded with rock piled ten to twelve feet high. The flotilla was approximately 700 feet long and 70 feet wide.

The AUDREY entered the Intracoastal Waterway and came up behind THE ADMIRAL and its tow. Coon, who was driving the AUDREY, initially attempted to pass THE ADMIRAL on the port (windward) side, but, finding the water too rough for a comfortable ride, decided to cross behind THE ADMIRAL and run instead in the calm waters on THE ADMIRAL's starboard side until they reached the protected waters on the leeward side of Pleasure Island (about a mile ahead of the collision site),

where he would drop back and cross the channel behind THE ADMIRAL. Coon, Jones and Shepp were in the pilothouse watching the waters ahead while Jerome was working in the back of the boat where the bait tank and nets were kept. Coon was using the depth finder to run along the edge of the channel.

The two sides presented vastly different and irreconcilable accounts as to how the accident occurred. According to Coon and Jones, the AUDREY maintained its course along the edge of the channel, and THE ADMIRAL's tow struck the port stern of the AUDREY, causing it to turn in front of THE ADMIRAL's tow. The AUDREY tried to accelerate out of harm's way, but could not escape and was run over by THE ADMIRAL's lead port barge. Petitioners' expert, Captain R.J. Underhill, investigated the collision and, based on the account of the survivors of the AUDREY, witness interviews, depositions, and an examination of the physical evidence, determined that, although Coon believed that he was running alongside the stern of the lead barge, the AUDREY had actually crept forward and was abreast of the bow of THE ADMIRAL's lead barge when THE ADMIRAL's tow drifted across the channel and struck the AUDREY's port stern tire bumper, causing the boat to turn in front of THE ADMIRAL's flotilla.

According to Captain Coyle, the captain of THE ADMIRAL, the AUDREY made a hard left turn in front of THE ADMIRAL's tow and, despite warning whistles from THE ADMIRAL, ran right in front of THE ADMIRAL's flotilla and was run over. Respondent's expert, Don Green, created a reconstruction of the accident based on Coyle's testimony that the AUDREY made a hard right

turn in front of THE ADMIRAL. Green also recruited Captain Jimmy Lewis, an "independent" witness who materialized on the eve of trial and generally supported Coyle's version of the accident. However, the district court did not credit Lewis' testimony because the story that Lewis told in his deposition the night before trial was significantly different from the story he told at trial. Respondents also presented the testimony of Holloway, a tug captain who did not see the accident, but said that when he came up on the collision site, THE ADMIRAL was lined up more or less in the center of the channel.

The district court believed Captain Underhill's account, and entered judgment in favor of the Petitioners. The court of appeals reversed, concluding that the district court's findings were clearly erroneous.

ARGUMENT

I. THE FAILURE TO RAISE A *DAUBERT* OBJECTION TO EXPERT TESTIMONY WAIVES ANY SUFFICIENCY OF THE EVIDENCE COMPLAINTS ABOUT THE RELIABILITY OF THE EVIDENCE.

Captain Underhill testified as a maritime accident reconstruction expert for the Petitioners. The district court credited Captain Underhill's testimony. Although Luhr never lodged any relevant objection to Captain Underhill's opinion testimony, the court of appeals criticized and ultimately rejected Captain Underhill's testimony because, *inter alia*, "[h]e did not attempt to support the AUDREY's version of the events with an explanation

of the physical evidence or other scientific analysis." *See* App. 17.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), this Court charged the district court with the responsibility to act as a gatekeeper, admitting only such expert testimony as has a reliable foundation and is relevant to the issues at trial. In general, the failure to object to the evidence at trial waives the right to raise admissibility issues on appeal, and the Ninth Circuit has ruled that a party cannot revive waived admissibility issues on appeal by merely couching the arguments in terms of insufficiency of the evidence. *Marbled Murrelet v. Babbit*, 83 F.3d 1060, 1066-67 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 942 (1997). The commentators agree: "The Daubert doctrine must be raised by objection at trial; it cannot be asserted after the evidence has been admitted under the guise of the sufficiency of the evidence." 22 CHARLES ALAN WRIGHT & KENNETH A. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5168.1 (1998 Supp.)

Although the court of appeals ignored Luhr's failure to object to Captain Underhill's testimony in its opinion, by reviewing the reliability of an expert's opinions in a sufficiency of the evidence context, and without reference to *Daubert* or the district court's gatekeeping function, the Fifth Circuit implicitly rejected the rule set out by the Ninth Circuit in *Marbled Murrelet*, and thus creating at least an apparent split among the circuits on this issue. The Fifth Circuit's ruling can only create unnecessary confusion in an area that ought to be clear.

In *Marbled Murrelet*, the Ninth Circuit explained:

> By failing to request a ruling in the district court on its *Daubert* objections, [the plaintiff] evaded the court's decision of the issue, and denied [the defendant] the opportunity to lay a better foundation for the evidence. . . . In this circumstance, permitting [the plaintiff] to challenge on appeal the reliability of [the defendant's] scientific evidence under *Daubert*, in the guise of an insufficiency-of-the-evidence argument, would give [the plaintiff] an unfair advantage. [The plaintiff] would be "free to gamble on a favorable judgment before the trial court, knowing that [it could] seek reversal on appeal because of [its] failure to obtain a ruling on [its] objections."

Marbled Murrelet, 83 F.3d at 1067 (citations omitted).

As in *Marbled Murrelet*, had a proper objection been lodged in this case, Captain Underhill would have explained more fully the bases for his opinions.

Trial courts and practitioners alike need to know whether appellate review of an expert's testimony will turn on whether the expert answered questions that the opposing side never asks and to anticipated objections that were never raised in the trial court. At a minimum, there should be a bright-line rule as to whether a *Daubert* objection is required to preserve complaints about the reliability of an expert's testimony. The rule set out by the Ninth Circuit in *Marbled Murrelet* is well reasoned and should be adopted by this Court as an appropriate application of the Court's *Daubert* decision.

II. THE DISTRICT COURT IS NOT REQUIRED TO AFFORD EXTRA WEIGHT TO A WITNESS'S TESTIMONY MERELY BECAUSE THE WITNESS IS "INDEPENDENT" OF THE PARTIES.

The court of appeals purportedly structured its analysis "around the factors that the Supreme Court cited in *Anderson* as potentially casting doubt upon the district court's credibility determinations," and one of the factors cited by the Court is "the testimony of independent witnesses." (App. 14) What this Court actually said in *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), was that "when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." *Anderson*, 470 U.S. at 575. This Court never even suggested that a reviewing court could approach a witness's testimony any differently merely because the appellate court determines from a cold record that the witness should be labeled "independent." By creating a rule that affords extra credibility on review to the testimony of "independent" witnesses, the court of appeals has, in contradiction to *Anderson*, ruled that the testimony of an "independent" witness carries the same inherent indicia of reliability as physical or documentary evidence.

Captain Lewis is a perfect example of why a witness' "independence" does not carry the same assurances of

reliability as physical or documentary evidence.[2] Although Lewis had no apparent interest in the case, he changed his story to exculpate Coyle. (*See* Tr. 264-65, 273-275) The fact that a witness has an interest in the litigation does not justify a presumption that the witness is a liar, and the fact that a witness is not a party is no evidence that he is telling the truth. Witnesses may lie for many different reasons. It is up to the district court as the finder of fact, not the court of appeals, to determine credibility. This Court should grant *certiorari* to require the Fifth Circuit to adhere to this Court's *Anderson* decision.

III. THE COURT OF APPEALS IMPROPERLY SUBSTITUTED ITS OWN FINDINGS OF FACT FOR THOSE OF THE DISTRICT COURT.

The court of appeals, purportedly applying the "clearly erroneous" standard set out in *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), decided that the district court's view of the facts was "implausible" and substituted its own view of the facts. In reality, the court of appeals did not examine the record to determine whether the evidence could support the district court's findings. The court of appeals decided that Luhr's position was more persuasive, and then scoured the record for anything that could be used to bolster Luhr's position or to call into question the district court's findings. In the

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[2] Even the court of appeals acknowledged that the district court was justified in declining to credit Lewis' testimony. App. 19, n. 10).

process, in addition to the errors discussed above, the court of appeals:

- viewed the evidence and drew all inferences therefrom in the light least favorable to the district court's findings;
- substituted its own credibility determinations for those of the district court;
- assumed facts not in evidence in support of Luhr's position and ignored or downplayed record evidence in support of the district court's findings;
- assumed the role of a maritime accident reconstruction expert and rendered opinions without foundation;
- focused on shortcomings of particular witnesses' recollection of events rather than on the internal consistency and plausibility of the district court's findings.

The court of appeals' general failure to apply the correct standard of review as discussed in this section is not so obvious on the face of the opinion that future courts will be led astray. The issues presented in this section therefore may not meet the Court's general standards for "certworthiness." However, Petitioners feel compelled to include a general discussion of the court of appeals' abandonment of the proper standard of review (1) to avoid the possibility of waiving important issues should the Court grant certiorari on other issues and (2) to demonstrate that the departures from the proper standard of review that are obvious on the face of the opinion are genuinely outcome determinative.

A. PHYSICAL EVIDENCE

The physical evidence in this case was consistent with the version of the accident found by the district court and no witness testified otherwise. In such a situation, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous . . . even when the district court's findings . . . are based . . . on physical or documentary evidence or inferences from other facts." *Anderson*, 470 U.S. at 574. The court of appeals nevertheless made two determinations regarding the physical evidence that are completely unsupported by the record, and that are, in fact, wrong.

First, the court of appeals determined that the absence of discernible physical evidence of the initial collision of the lead starboard barge with the AUDREY's port stern was the same as evidence that no such collision occurred. The court opined that it is "implausible" that a collision of the force needed to spin the AUDREY around would not have left any mark.[3] Despite this alleged "implausibility," *no* witness testified that being hit in the tire fender would necessarily have left any distinguishing marks on either vessel, or that the failure to find any such marks had any significance whatsoever. Nor was there any evidence about the force of impact that would be

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[3] Contrary to the court of appeals' opinion, the evidence demonstrated the existence of tire marks on THE ADMIRAL's barge consistent with the district court's findings. In his deposition, Captain Underhill noted the existence of a smudge or tire mark on THE ADMIRAL's starboard lead barge, but conceded that the mark could have been left by a different tire.

required to turn the AUDREY in front of THE ADMIRAL, the strength of the materials, or anything else from which the court of appeals could legitimately draw the conclusion that it did. Even the barge that capsized the AUDREY (on the second impact) suffered no damage whatsoever and showed no signs of impact other than minor paint scrapings from the AUDREY. (Tr. 292, 305) Luhr's own expert, its surveyor, conceded that the purpose of a fender is "to prevent two items from damaging each other" and that a properly positioned tire is a very good fender. (Tr. 297) The court of appeals assumed the role of an accident reconstruction expert and then rendered an opinion without the benefit of any relevant experience or underlying data.

Second, the court of appeals determined that the location of the sunken AUDREY "does not square with the AUDREY's version of the accident." No expert testified that the location of the wreck was any evidence of where the collision occurred. The court simply assumed, contrary to all the evidence, that the AUDREY sank at the point where the collision occurred.

Between the time the AUDREY was run over and the time it sank, the AUDREY ran down the length of THE ADMIRAL's flotilla, two boats came to render aid, THE ADMIRAL launched its launch, and Holloway (who got underway about fifteen minutes after being passed by THE ADMIRAL) caught up with and passed THE ADMIRAL. During this entire period, the AUDREY was to the port side of THE ADMIRAL's flotilla, and at one point Murray's boat had a line on the AUDREY and the AUDREY was even tied to one of THE ADMIRAL's barges until that line broke. (Claimants' Exhibit 35 at

40-42) Any movement by THE ADMIRAL to reposition itself in the center of the channel would necessarily have moved the AUDREY in the same direction. The district court's view of the physical evidence is unquestionably plausible

B. EXPERT WITNESSES

The court of appeals disparaged the qualifications and methodology of Captain Underhill, whom the district court believed, and extolled those of Don Green, whom the district court did not believe. Even if the court of appeals could properly reject as unreliable expert testimony admitted without objection, the appellate court's credibility choices would still be grounds for reversal because that court could not have approached the district court's credibility choices with the deference required under *Anderson* and reach the result it did.

1. Qualifications

The court of appeals dismissed Captain Underhill as a mere surveyor while expounding on Green's "qualifications." In fact, Captain Underhill's qualifications eclipse Green's in almost every respect. Captain Underhill has held an unlimited master's license for over fifty years (Tr. 128), while Green never progressed beyond a 1600-ton oceans and an unlimited second mate license (Tr. 310-11). Captain Underhill has investigated thousands of marine casualty losses and collisions for insurance companies and attorneys and as a designated expert by courts of the United States and England. (Tr. 129; Claimants' Exhibit 6).

Green worked for the Coast Guard as an investigator for only about five years (more than a decade ago) and now runs a test preparation school (Tr. 310).

2. Basis for Opinion

The Court dismissed Captain Underhill's opinions as based "almost exclusively on Coon's explanation of the collision" and then listed the many sources Green purportedly relied upon in forming his opinion. Had the Court approached this case objectively, it would have noted that Underhill consulted every source that Green did and more; that he personally investigated the case, interviewed witnesses, reviewed the depositions and the Coast Guard report, and examined the physical evidence. (Petitioner's Exhibit 77 at 80-83; Claimants' Exhibit 10)

With proper deference to the district court, the opinion should have pointed out that Green's view of the collision was limited almost exclusively to the accounts of Coyle, an obviously interested witness; Lewis, a notoriously unreliable witness; and Holloway, who was not even on the scene at the time the collision occurred. (*See* Tr. 257-58, 316; Petitioner's Exhibit 76 at 9)

In addition, contrary to the implication of the court of appeals' opinion, there was no "scientific analysis" connected with Green's opinion, and Green did *not* testify that the physical evidence was inconsistent with the version of the accident found by the district court. Even Green's computer presentation, which the court of appeals praised, failed to include the AUDREY's version

of the accident as presented by Captain Underhill. (Tr. 346)

3. Criticisms of Underhill

The court of appeals criticized Captain Underhill because he revised his opinion as to whether THE ADMIRAL struck the AUDREY at a slight angle or parallel. The significance of that revision is merely a credibility determination, as to which the district court is entitled a heightened level of deference. *See Anderson*, 470 U.S. at 575. The district court, upon its personal observations, is in a far better position than an appellate court, with nothing but the cold record, to determine whether an expert's revision of his opinion is an honest and objective reassessment. Although Underhill reconsidered one aspect of his reconstruction of how the accident occurred, the account accepted by the district court is in no way self-contradictory or internally inconsistent, and it is not 'so implausible on its face' that no reasonable factfinder could credit it. It therefore cannot be clear error for the district court to accept it. *See id.* The fact that an expert revises or reconsiders an *opinion* cannot make the expert's opinion so inherently incredible that no reasonable factfinder could ever believe it, yet that is, essentially, what the court of appeals ruled.

C. INDEPENDENT WITNESSES

Even if the court of appeals were correct in its theory that the testimony of "independent" witnesses is entitled

to extra weight on review, the court's treatment of independent witnesses in this case would still be grounds for reversal. The court of appeals opined that the testimony of Joe Holloway, a relief captain aboard the M/V CITY OF PORT ALLEN was inconsistent with the AUDREY's version, and that the testimony of Robert Witt, a deckhand aboard THE ADMIRAL, was generally consistent with THE ADMIRAL's version of events. The court was wrong on both counts. The court's presentation of these witness's testimony leaves out crucial facts which the court could not include in the opinion and still claim to adhere to the "clearly erroneous" standard.

1. Holloway

The court of appeals' analysis of Holloway's testimony, and the court's conclusion that Holloway's testimony is inconsistent with the AUDREY's account of the collision, is wrong. It leaves out the crucial fact that Holloway did not testify about THE ADMIRAL's position at the time of the collision. Holloway did not say that THE ADMIRAL was in the center of the channel for the "entire time" (as reported in the Court's opinion). He testified that THE ADMIRAL was "pretty much in the center of the *channel when I came up behind him.*" (Petitioner's Exhibit 76 at 8) When Holloway came up behind THE ADMIRAL (*i.e.* closed to within 1/2 to 1/4, miles), and when Holloway testified that Coyle told him that "a shrimp boat had pulled in front of him and he was backing down," the AUDREY had *already* been run over and was capsized on the port side of THE ADMIRAL's tow, and a shrimp boat was on the scene. (*See* Petitioner's

Exhibit 76 at 9, 23) (Murray's boat came to render aid. (Claimants' Exhibit 35 at 41))

THE ADMIRAL passed Holloway's vessel while it was at the Thousand-Foot Cut dropping off a barge. (Petitioner's Exhibit 76 at 31) Holloway did not get underway until "probably 15 minutes" later. (Petitioner's Exhibit 76 at 34) The Intracoastal angles approximately 45° around Stewts Island between the Thousand Foot Cut and the collision site, and Holloway had to travel at least three quarters of a mile before he could have a clear view down the channel at THE ADMIRAL. (Underhill depo. at 51; Claimants' Exhibit 7)

Holloway denied that he saw the accident occur or that he knew when it occurred. He did not testify to seeing the telltale black smoke indicating that THE ADMIRAL had gone into reverse. (*See* Petitioner's Exhibit 76 at 9) Holloway did not see the AUDREY as it pulled out of the Neches River into the Intracoastal, as it started to pass THE ADMIRAL on the port side and then backed down and crossed behind the AUDREY to pass on its leeward side, as it ran alongside THE ADMIRAL, or at the time of the collision. The first time Holloway saw the AUDREY was after the accident, when he mistook it for pilings. (Petitioner's Exhibit 76 at 24)

2. Witt

The court of appeals' view of the deckhand Witt's testimony is similarly skewed. Witt's testimony is completely consistent with the district court's findings and, in

places, inconsistent with Coyle's testimony.[4] Witt's testimony demonstrates that Coyle was not telling the truth when he said that he sounded a danger signal as soon as the AUDREY allegedly turned in front of THE ADMIRAL. Even if the district court had accepted Coyle's version of the accident, Coyle's inattention, as evidenced by his failure to sound a warning until after the AUDREY was about to be run over, would have supported a finding of some fault on THE ADMIRAL.

D. IMPLAUSIBILITY

The court of appeals determined that what it termed "the AUDREY's version of the collision" (which is distinct from Captain Underhill's reconstruction of the accident, which formed the basis for the district court's findings) was implausible for a number of reasons, none of which stands up to scrutiny under the appropriate standard of review.

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[4] The court of appeals said that Witt saw the AUDREY pass about 100 feet off the starboard beam, and "shortly thereafter" Coyle called Witt and began to blow the danger signal, suggesting that the AUDREY was in the process of running up the side of THE ADMIRAL to make the hard left turn across the channel. In fact, Witt's testimony as to where he saw the AUDREY passing and where the collision occurred make "shortly thereafter" about 10 minutes. (*See* Claimants' Exhibit 35 at 26-27 and exhibit 2) When Witt was asked to mark where the accident occurred, he drew an X at the side of the channel, consistent with the district court's findings, and contrary to Coyle's account. (*See* Claimants' Exhibit 35 at 26-27, exhibit 2)

1. "The AUDREY's Version"

The court of appeals purported to find inconsistency in "the AUDREY's version" of events. However, the court did not evaluate the interna! consistency and plausibility of the district court's findings, or Captain Underhill's testimony upon which the court based its findings. *See Anderson*, 470 U.S. at 575. Instead, the court focused on one non-critical aspect of one witness's[5] testimony (Coon's failure to notice that the AUDREY was running forward of where he thought it was relative to THE ADMIRAL) which was not a part of "the AUDREY's version" of events as testified to by Captain Underhill, and which the district did not incorporate into its findings. Coon's belief that, at the time of the collision, he was running alongside the stern of the lead barge was obviously mistaken, and it was never a part of Underhill's reconstruction or the district court's findings. Underhill's reconstruction, and the district court's findings, are not "so internally inconsistent or implausible on [their] face that a reasonable factfinder would not credit it." *See Anderson*, 470 U.S. at 576.

Even if Coon's account was synonymous with "the AUDREY's version," the district court apparently believed that Coon and Jones gave truthful testimony and that Coyle and certain other witnesses for Luhr did not. The mere fact that one witness may have been mistaken about the AUDREY's position relative to THE ADMIRAL

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[5] Jones said that the AUDREY seemed to be keeping a constant speed and that it did not "get out in front of the barges," (Tr. 40); she did not say that the AUDREY stayed even with the stern of the lead barge.

immediately before the collision does not render the remaining evidence "so implausible on its face that no reasonable factfinder would credit it."

2. The AUDREY's Failure To See THE ADMIRAL Closing

The court of appeals' substituted finding of fact that it is "implausible" that no one on the AUDREY saw THE ADMIRAL closing in is unjustified. Coon and Jones were in the pilothouse, navigating by the depth finder and watching for dangers ahead, as lookouts are known to do. Shepp was also in the pilothouse, also presumably looking ahead. (Tr. 35, 37, 75) If, as the district court found, the AUDREY had crept forward, with the bow of THE ADMIRAL's lead barge running alongside the stern of the AUDREY, no one in the pilot house would be able to see THE ADMIRAL and its tow unless they turned around and looked out the back of the pilothouse.

Jerome was in the back of the boat where his view of THE ADMIRAL would have been unobstructed *if* he were looking toward the barges, but there is no evidence that he was looking in that direction. On the contrary, the evidence demonstrates that Jerome was working in the back of the boat where the bait tanks and nets were kept. (Tr. 36) In order to determine that the district court's findings were implausible, the court of appeals had to assume, in the absence of any evidence or cogent reasoning, that the occupants of the pilothouse would have been looking backwards rather than watching where the boat was going, and that Jerome would have been facing toward THE ADMIRAL rather than away.

3. Implausibility of Luhr's Account

The court of appeals did not view THE ADMIRAL's story with the same critical eye that it turned on the district court's fin'ings. There is absolutely no reason why Coon would make a hard left turn directly in front of THE ADMIRAL's tow.

It is uncontested that Coon started to pass the AUDREY on the windward side, but moved instead to the leeward side to avoid the rough water. (Tr. 71-72) Coon intended to stay on the leeward side of the ADMIRAL until he reached Pleasure Island where he could cross the channel in protected waters between Pleasure Island and Port Arthur, and then proceed on down the Intracoastal. At Coon's estimated speed of about four miles per hour (Tr. 104), he was still at least ten to fifteen minutes away from his crossing point. (Tr. 70, 73, 104; *see* Claimants' Exhibit 7) Why then, would he make a left turn in front of the ADMIRAL, giving up the windbreak and putting the AUDREY back in rough waters? Why would Coon make a left turn directly into the path of a seventy-foot wide mountain of rocks?

While it may be somewhat surprising that Coon, Jones, Jerome and the child would not notice THE ADMIRAL closing from the rear port side, it is not plausible that the accident could have occurred as Coyle testified without Coon and Jones seeing the peril ahead. The district court heard the evidence and viewed Luhr's computer reconstruction of Coyle's version of the accident. The implausibility of Luhr's account was self-evident.

Viewing the record in its entirety, the court of appeals could not properly reverse the district court's decision even though the court may be convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. *Anderson*, 470 U.S. at 574.

CONCLUSION

The Court should grant *certiorari* to review the Fifth Circuit's treatment of expert testimony in this case. Trial courts and practitioners alike need to know whether appellate review of an expert's testimony will turn on whether the expert answered questions that the opposing side never asks and to anticipated objections that were never raised in the trial court. If the Fifth Circuit's resolution of this case were correct, the presentation of expert testimony would become unnecessarily and unreasonably complicated.

The Court should also grant *certiorari* to resist expansion of appellate review and the restriction on the trial court's ability to make credibility determinations that is implicit in the court of appeals' decision to give extra weight to the testimony of "independent" witnesses on review. The trial court is in a far better position than the court of appeals to determine the weight that should be afforded to a particular witness's "independence" from the parties.

Finally, the Court should grant *certiorari* to remind the Fifth Circuit that it is not enough merely to acknowledge that the "clearly erroneous" standard applies while in fact conducting a covert *de novo* review.

Petitioners therefore request that the Court grant *certiorari*, reverse the Fifth Circuit, and order that the district court's findings with regard to how the collision in this case occurred be affirmed. Alternatively, the Court should remand for reconsideration in light of the Fifth Circuit's misapplication of the standards annunciated in *Anderson*.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 97-40841

IN THE MATTER OF THE COMPLAINT OF LUHR BROS. INCORPORATED, as Owner, Owner Pro Hac Vice, Operator and/or charterer of the M/V The Admiral, in the Cause of Exoneration from and/or Limitation of Liability, Civil and Maritime,

Plaintiff,

LUHR BROS. INCORPORATED,
Petitioner-Appellant,

VERSUS

BARRE SHEPP; WILLIAM COON; MATTHEW M. SHEPP, Estate of; AUDREY JEROME; ALLEN JEROME, Estate of; CONNIE SUE VALVERDE, Individually and as representative of the estate of Matthew Marvin Shepp, deceased,

Claimants-Appellees.

The ESTATE OF ALLEN L. JEROME, OWNER OF THE F/V AUDREY, Praying for Exoneration from or Limitation of Liability,

Plaintiff,

LUHR BROS. INCORPORATED,

Claimant-Applicant,

VERSUS

BARRE SHEPP; WILLIAM COON; CONNIE SUE VALVERDE, Individually and as representative of the

estate of Matthew Marvin Shepp, deceased;
MATTHEW M. SHEPP, Estate of,

Claimants-Appellees.

Appeal from the United States District Court
For the Eastern District of Texas

(Filed Sept. 30, 1998—

Before WISDOM, KING and DAVIS, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Following a bench trial in this maritime collision case, the district court denied Luhr Bros. Incorporated's Petition for Limitation of Liability and awarded the Claimants damages totaling $4,397,308.37. For the reasons that follow, we reverse and render.

I.

A.

This case arises out of a collision between the M/V THE ADMIRAL, a tugboat pushing a flotilla of six barges loaded with crushed rocks, and the F/V AUDREY, a shrimp boat carrying four people. Two passengers aboard the AUDREY, Allen L. Jerome and Matthew M. Shepp, died as a result of the collision. The parties present contrasting accounts as to how the collision occurred and who is responsible.

The following facts are not in dispute. THE ADMIRAL is a 2400 horsepower, twin screw, inland river tugboat owned and operated by Luhr Bros., Incorporated ("Luhr" or "Luhr Bros."). It is approximately 120 feet

long and 35 feet wide. On the morning of April 20th, 1996, THE ADMIRAL received instructions to relieve the M/V THE ROBERT T., another tugboat operated by Luhr Bros. At the time, THE ROBERT T. was pushing six barges loaded with crushed rock, made up two abreast and three long, through the Intracoastal Waterway. Each barge was 195 feet long and 35 feet wide. THE ADMIRAL relieved THE ROBERT T. and continued pushing the barges westbound along the Intracoastal Waterway, headed for Sergeant Beach, Texas, where the crushed rock was to be used in a coastal stabilization project. THE ADMIRAL proceeded to the intersection of the Neches River and the Sabine-Neches Canal, part of the Intracoastal Waterway.

The AUDREY, a shrimp boat owned by Allen L. Jerome, left the dock at the Rainbow Bridge near Orange, Texas at approximately 6:30 that morning. William Coon piloted the boat, with Connie Valverde, née Jones ("Connie Jones"), Matthew Shepp, Connie Jones's seven-year-old son, and Mr. Jerome as passengers. The group was taking a pleasure cruise and was planning to go fishing. The AUDREY left the dock and proceeded south down the Neches River towards the Intracoastal Waterway and Sabine Lake, their intended destination. THE ADMIRAL and the AUDREY met at the intersection of the Intracoastal Waterway and the Neches River. Captain Michael Coyle, at the helm of THE ADMIRAL, observed the AUDREY on his starboard, or right, side as he crossed through the intersection. The AUDREY entered the intersection and crossed behind the stern of THE ADMIRAL and its flotilla, which measured approximately 700 feet in

total length. Both vessels then continued westbound down the Sabine-Neches Canal.

The AUDREY circled around and again passed under the stern of THE ADMIRAL, returning to the starboard side of THE ADMIRAL and her tow.[1] It is undisputed that the AUDREY eventually passed THE ADMIRAL on her starboard side, at least fifty to sixty feet from the tow.[2] Both parties further agree that the AUDREY got as far as the stern of THE ADMIRAL's starboard lead barge. The events from then until the collision are disputed. The collision occurred around mile marker 277. As a result of the collision, the AUDREY capsized and was sunk. Both William Coon and Connie Jones were able to swim out

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[1] Although the barges in a flotilla such as THE ADMIRAL's are pushed rather than towed, they are nonetheless referred to as the "tow".

[2] As the overtaking vessel, the AUDREY was subject to Inland Navigation Rule 13, 33 U.S.C. § 2013 (1994), which provides,

> (a) Overtaking vessel to keep out of the overtaken vessel's way
>
> Notwithstanding anything contained in Rules 4 through 18, any vessel overtaking any other shall keep out of the way of the vessel being overtaken.
>
> . . .
>
> (d) Overtaking vessel to become crossing vessel only when finally past and clear
>
> Any subsequent alteration of the bearing between the two vessels shall not make the overtaking vessel a crossing vessel within the meaning of these Rules or relieve her of the duty of keeping clear of the overtaken vessel until she is finally past and clear.

from underneath the AUDREY and were rescued by other vessels. Sadly, Allen Jerome and Matthew Shepp could not escape and both drowned. It was later discovered that they had become entangled in shrimping gear, which prevented their escape.

The respective versions of the events leading up to the collision are widely divergent. According to the AUDREY's version, Mr. Coon initially attempted to pass THE ADMIRAL and her flotilla of barges on the port, or left, side. Encountering rough and choppy seas, Mr. Coon decided to place the AUDREY on the starboard side of THE ADMIRAL and her barges, where the flotilla would block the wind and the water would be calmer. Therefore, Mr. Coon turned the AUDREY to port to avoid THE ADMIRAL's wake, looped around, passed under THE ADMIRAL's stern, and moved down the starboard side of THE ADMIRAL. As he approached and passed THE ADMIRAL, Mr. Coon made no attempt to contact the tugboat.

Mr. Coon testified that he intended to run alongside THE ADMIRAL and her flotilla until he reached the AUDREY's destination. Consistent with this plan, he slowed the AUDREY as it reached the stern of the starboard lead barge and maintained this position. According to Mr. Coon, the AUDREY traveled along the edge of the ship channel, approximately fifty yards from the starboard bank and fifty yards from THE ADMIRAL and her barges, which were on the AUDREY's port side. Mr. Coon's testimony placed THE ADMIRAL approximately 100 yards (300 feet) from the bank, or roughly in the center of the shipping channel. As the AUDREY came alongside THE ADMIRAL, Allen Jerome was working in

the rear of the shrimp boat. Thus, Mr. Jerome, Mr. Coon, and Connie Jones had unobstructed views of THE ADMIRAL.

According to both Mr. Coon and Connie Jones, the AUDREY maintained her course and speed and Mr. Coon never made a port turn towards or in front of THE ADMIRAL's tow. Both testified that they looked over at THE ADMIRAL several times but never saw the gap between the barges and the AUDREY closing. They also testified that the first indication of danger was when the starboard lead barge in THE ADMIRAL's tow struck the port stern of the AUDREY, resulting in the AUDREY being spun around in front of THE ADMIRAL's tow. Immediately following this first collision, Mr. Coon pushed the AUDREY's throttle to full in an attempt to escape from the barges. However, his efforts proved futile as the AUDREY was struck again, this time by the port lead barge, causing the AUDREY to capsize and eventually sink.

THE ADMIRAL's account of the collision paints a vastly different picture. Captain Coyle testified that after passing through the intersection of the Neches River and the Intracoastal Waterway, he did not see the AUDREY again until he observed it attempting to pass on THE ADMIRAL's starboard side. Captain Coyle did not initiate any radio contact with the AUDREY. The AUDREY proceeded along the starboard side of THE ADMIRAL's tow and, according to Captain Coyle, the AUDREY maintained a constant speed of approximately five miles per hour faster than THE ADMIRAL and remained fifty to

one hundred feet from the starboard side of THE ADMIRAL's tow.[3]

According to Captain Coyle, shortly after the AUDREY passed THE ADMIRAL's starboard lead barge, it made an abrupt turn to port and crossed approximately thirty feet in front of the bow of THE ADMIRAL's tow. At this point, Captain Coyle radioed his deckhand Robert Witt and told him that a boat was crossing the bow. Captain Coyle also sounded a danger signal, shifted THE ADMIRAL's engines from full ahead to full astern (a process that takes approximately eighteen seconds to complete), and attempted to contact the AUDREY over the radio. Unfortunately, at this point the collision was imminent and the bow of the port lead barge of THE ADMIRAL's tow struck the port side of the AUDREY amidships. The AUDREY capsized, went underneath the bow of the barge, and popped up on the port side of the port lead barge. When THE ADMIRAL and her tow finally came to a stop, the AUDREY was sinking in the middle of the channel some 200 to 300 feet behind THE ADMIRAL.

B.

Following the collision, Luhr Bros., as owner and operator of THE ADMIRAL, filed a limitation of liability proceeding pursuant to the Limitation of Vessel Owner's

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[3] Captain Coyle estimated that THE ADMIRAL and her tow were making roughly three miles per hour. In contrast to Captain Coyle's estimation of the AUDREY's speed, Mr. Coon testified that the AUDREY was proceeding at the same speed as THE ADMIRAL.

Liability Act, 46 App. U.S.C. §§ 181-196 (1994). Allen Jerome's widow, Audrey Jerome, filed a separate limitation of liability petition on behalf of the estate of Allen Jerome, the owner of the AUDREY. The court consolidated these actions. Connie Jones and her former husband, Barre Shepp, filed claims against Luhr Bros. in both their individual capacities and as representatives of the estate of their deceased son, Matthew Shepp. William Coon filed a claim against Luhr Bros. for personal injuries he sustained in the collision. Finally, Audrey Jerome filed claims against Luhr Bros. in her individual capacity and as representative of the estate of Allen Jerome. Following a two-day bench trial, the district court found THE ADMIRAL solely at fault and adopted almost verbatim the Findings of Fact and Conclusions of Law proposed by the Claimants.

Additionally, the district court denied Luhr's Petition for Limitation of Liability and awarded the Claimants the following damages: $300,000.00 to the Estate of Matthew Shepp for damages sustained prior to his death; $500,000.00 to Barre Shepp for wrongful death damages; $1,525,535.81 to Connie Jones for medical expenses, personal injury damages, and wrongful death damages; $602,191.25 to William Coon for medical expenses and personal injury damages; $419,173.00 to the Estate of Allen Jerome for damage to the AUDREY, the cost of removing the AUDREY, funeral expenses, and damages sustained prior to his death; and $1,000,000.00 to Audrey Jerome for wrongful death damages. Including interest, the court awarded Claimants a total of $4,397,308.37. This appeal followed.

II.

A.

In reaching its conclusion that THE ADMIRAL was solely at fault in the collision with the AUDREY, the district court accepted almost entirely the version of events as related by William Coon and Connie Jones, and concluded that THE ADMIRAL allowed her tow to drift to the right side of the channel where it struck the AUDREY, pushing the AUDREY into the path of the barges.

The district court found that: (1) THE ADMIRAL's barges were only partially "made up" when THE ADMIRAL got underway and Captain Coyle was distracted by crew members working on the decks of the barges; and (2) Captain Coyle was unaware of the heightened level of diligence compelled by the Coast Guard's requirement of permits for oversized tows.

The district court concluded that Captain Coyle and THE ADMIRAL violated several Inland Navigational Rules and related regulations including: (1) failure to obtain an oversized tow permit as required by 33 C.F.R. § 162.75(b)(5)(I) (1996); (2) failure to keep a proper lookout, in violation of Inland Navigational Rule 5, 33 U.S.C. § 2005; (3) failure to take proper evasive action when the risk of a collision became apparent, in violation of Inland Navigational Rule 8, 33 U.S.C. § 2008; (4) failure to keep track of THE ADMIRAL's position in relation to the AUDREY, in violation of Inland Navigational Rule 7, 33 U.S.C. § 2007; and (5) failure to sound a danger signal when the AUDREY's intentions were not clear, in violation of Inland Navigational Rule 34, 33 U.S.C. § 2034.

In denying limitation of liability to Luhr Bros., the district court found that Captain Coyle was "incompetent," and that his negligent conduct caused the collision with the AUDREY. Furthermore, the district court found that Luhr Bros. did not have any written policy or procedure for the "training, hiring, firing, review or to establish the qualifications of personnel who captain their vessels." According to the district court, this failure to supervise its captains adequately was a proximate cause of the accident, and this failure was within Luhr Bros.'s privity or knowledge, thus barring limitation of liability.

On appeal, Luhr Bros. makes a number of challenges to the Judgment entered against it. First, Luhr Bros. contends that the district court's determination of the cause of the collision was based upon findings of fact that are clearly erroneous. Before proceeding to the merits of Luhr Bros.'s argument, we pause to revisit the standards by which we review a challenge to the district court's factual findings.

B.

In *Anderson v. City of Bessemer City*, 470 U.S. 564, 105 S. Ct. 1504 (1985), the Supreme Court elucidated the standard of review contained in Federal Rule of Civil Procedure 52(a), which mandates that "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." The Court set forth "certain general principles governing the exercise of the appellate court's power to overturn findings of a

district court. . . . " *Anderson*, 470 U.S. at 573, 105 S. Ct. at 1511. Foremost among these principles

> is that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court.

Id. (alteration in original) (citation omitted) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 542 (1948)). The appellate court must accept the district court's account of the evidence if it is plausible when viewed in light of the entire record. Moreover, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* at 574, 105 S. Ct. at 1511; *see also Henderson v. Norfolk S. Corp.*, 55 F.3d 1066, 1069 (5th Cir. 1995).

The Court based this deference to the original finder of fact not only on the trial judge's expertise in fulfilling the role of factfinder and determining credibility, but also on the principle that a "[d]uplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources." *Anderson*, 470 U.S. at 574-75, 105 S. Ct. at 1512. As the Court succinctly stated, "the trial on the merits should be 'the "main event" . . . rather than a "tryout on the road." ' "

Id. at 575, 105 S. Ct. at 1512 (alteration in original) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 90, 97 S. Ct. 2497, 2508 (1977)).

The Court observed that Rule 52(a) requires greater deference to the trial court's findings when they are based upon determinations of credibility. Nevertheless, it cautioned against permitting a trial judge to insulate findings from review simply by denominating them credibility determinations. *Anderson*, 470 U.S. at 575, 105 S. Ct. at 1512. A witness's demeanor and inflection are only two considerations the trial court must take into account when deciding whether to credit a witness's testimony. The court must also consider relevant documents or objective evidence that may contradict the witness's story and whether a witness's story is internally consistent and plausible on its face. *Id.*

In addition, in cases such as the instant one, where the district court's Findings of Fact and Conclusions of Law are near-verbatim recitals of the prevailing party's proposed findings and conclusions, with minimal revision, we should approach such findings with "caution." *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co. Inc.*, 73 F.3d 546, 574 (5th Cir. 1996). We may "take into account the District Court's lack of personal attention to factual findings in applying the clearly erroneous rule," *Federal Deposit Insurance Corp. v. Texarkana National Bank, 874 F.2d 264, 267 (5th Cir. 1989) (quoting Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d 252, 258 (5th Cir. 1980)), and we "can feel slightly more confident in concluding that important evidence has been overlooked or inadequately considered when factual findings [are] not the product of personal analysis and determination by the trial judge." *Amstar*

Corp., 615 F.2d at 258 (quoting *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 314 n.1 (5th Cir. 1977)).[4]

The trial court's adoption of the prevailing parties' proposed findings, however, does not alter the bedrock principle that the findings may not be overturned on appeal absent clear error. *Anderson*, 470 U.S. at 572, 105 S. Ct. at 1510-11. As the Supreme Court has made clear, and as our cases have reinforced, on appellate review we owe great deference to the trial court's findings.[5] This is not to say, however, that we will never find clear error. When, after an examination of the entire evidence, we are "left with the definite and firm conviction that a mistake has been committed," clear error exists and it is our duty as the reviewing court to correct this mistake. *Justiss Oil Co., Inc. v. Kerr-McGee Refining Corp.*, 75 F.3d 1057, 1062 (5th Cir. 1996) (citing *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 542 (1948)).

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[4] Stricter appellate scrutiny of "rubber-stamped" findings by the district court is mandated in at least four other circuits. *See, e.g., Cuthbertson v. Biggers Bros., Inc.*, 702 F.2d 454, 458-59 (4th Cir. 1983); *Gimbel v. Commodity Futures Trading Comm'n*, 872 F.2d 196, 199 (7th Cir. 1989); *Alcock v. Small Bus. Admin.*, 50 F.3d 1456, 1459 n.2 (9th Cir. 1995); *Ramey Constr. Co., Inc. v. Apache Tribe*, 616 F.2d 464, 467 (10th Cir. 1980). The practice of "rubber-stamping" findings has been routinely discouraged. *See, e.g., Anderson*, 470 U.S. at 572, 105 S. Ct. at 1510-11; *Gimbel*, 872 F.2d at 199; *Amstar Corp.*, 615 F.2d at 258.

[5] *See, e.g., Amadeo v. Zant*, 486 U.S. 214, 223, 108 S. Ct. 1771, 1777 (1988) ("clearly-erroneous standard of review is a deferential one"); *Anderson*, 470 U.S. at 573-75, 105 S. Ct. at 1504, 1511-12; *In re Port Arthur Towing Co.*, 42 F.3d 312, 318-19 (5th Cir. 1995); *Sockwell v. Phelps*, 20 F.3d 187, 190 (5th Cir. 1994).

III.

A.

We structure our analysis around the factors that the Supreme Court cited in *Anderson* as potentially casting doubt upon the district court's credibility determinations, and therefore its findings. *See Anderson*, 470 U.S. at 575, 105 S. Ct. at 1512. In this case, these interrelated factors include: (1) the physical evidence presented at trial; (2) the expert testimony analyzing such evidence; (3) the testimony of independent witnesses; and (4) the plausibility and internal consistency of the AUDREY's version of events.

1. The Physical Evidence

The physical evidence collected after the collision conflicts with the AUDREY's version of events. This evidence includes the damage sustained by the barges and the AUDREY and the location of the sunken AUDREY.

Daniel Carter and John Stickling, Jr., who independently inspected THE ADMIRAL's six barges following the accident, testified as to the damage that the barges had incurred.[6] Their task was to examine the AUDREY and the two lead barges – the M-8005 and the M-878 – to determine whether evidence existed of a collision between either of those barges and the AUDREY. As mentioned above, according to the AUDREY, there were two points of impact with THE ADMIRAL's barges, the

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[6] Mr. Carter conducted his survey approximately two hours after the collision. Mr. Stickling conducted his survey roughly two weeks later.

first with the starboard lead barge, the M-878, and the second with the port lead barge, the M-8005.

In contrast to the AUDREY's version, the only evidence of fresh or new contact on either barge was found on the port side of the bow of the M-8005 barge, consistent with THE ADMIRAL's account. Two horizontal scrapes of paint, a white scrape at the top and a blue scrape at the bottom, ran along the port edge of the M-8005's bow. These scrapes matched the color scheme of the AUDREY. Neither surveyor found any evidence of a recent impact on the M-878, the starboard lead barge. Similarly, the AUDREY only exhibited damage to the port side amidships, consistent with one impact with the bow of the M-8005 barge.

To explain the lack of physical damage to the AUDREY from the first alleged impact, both Mr. Coon and Captain Underhill, an expert witness for the Claimants, cited a rubber tire fender as responsible for preventing any damage to the rear port quarter of the AUDREY or the starboard bow of the M-878. It is implausible, however, that a collision of the force needed to spin and push the AUDREY in the manner that Mr. Coon alleged, even if cushioned by a rubber tire, would leave no marks – not even tire marks – on either the AUDREY or the M-878 barge.

Furthermore, the location of the sunken AUDREY does not square with the AUDREY's version of the accident. According to the AUDREY's version of the collision, THE ADMIRAL drifted or angled towards the starboard bank where it struck the AUDREY at a point close to the edge of the shipping channel, approximately

100 to 150 feet from the north bank. The AUDREY eventually sank approximately 70 feet south of this point, after it had been thrust across the entire width of the barge flotilla. Had the collision occurred in this manner, we would expect to find the sunken AUDREY approximately 170 to 220 feet away from the north bank. The Corps of Engineers' survey, however, revealed that the AUDREY was raised from a point south of the center of the channel, at least 300 feet from the north bank.

It is true that the AUDREY did not sink immediately, and thus theoretically could have drifted farther (south) into the channel. However, all trial testimony indicated that both wind and tide were pushing towards the north bank. Thus, to the extent that the AUDREY moved as it sank, it would have moved to the north, not the south. Again, this supports THE ADMIRAL's version of the events. Moreover, those advocating the AUDREY's version provided no evidence or argument to explain the location of the sunken AUDREY.

In sum, the physical evidence strongly supports THE ADMIRAL's version of events – a single collision taking place near the middle of the channel with a single point of impact between the port side of the AUDREY and the port bow of the port lead barge.

2. Expert Witnesses

The district court also had before it expert witness testimony interpreting the physical evidence and analyzing the movements of the two vessels. Captain R.J. Underhill testified for the Claimants, and Donald Green testified for Luhr Bros.

Captain Underhill, a marine surveyor, testified as an expert witness to, among other things, the AUDREY's version of the collision. He theorized during his deposition and on direct examination that THE ADMIRAL had canted or angled fifteen degrees across the channel and had struck the AUDREY, which had been running parallel to the front of the lead starboard barge. On cross-examination, after his version of events was challenged by Luhr's counsel, he altered his opinion, stating that THE ADMIRAL did not angle or cant, but instead remained almost parallel to the bank and was set into the AUDREY by the current.[7] His testimony was based almost exclusively on Mr. Coon's explanation of the collision.[8] He did not attempt to support the AUDREY's version of the events with an explanation of the physical evidence or other scientific analysis.

This is in contrast to the expert testimony provided by Luhr Bros. One of Luhr's experts, Donald Green, operates a marine school that specializes in preparing candidates for Coast Guard examinations and training boat captains for licenses and radar endorsements required by the Coast Guard. He is a retired Coast Guard commander who spent twenty-three years in the Coast Guard, five and one-half of those years as an investigator. Mr. Green reviewed depositions, surveyors' reports

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[7] It is this explanation of the events – THE ADMIRAL drifted to starboard – that the district court adopted in its findings.

[8] Even so, as we explain in more detail later, Captain Underhill was forced to admit that his understanding of the mechanics of the collision was not consistent with Mr. Coon's testimony. See Section III.A.4.

describing the physical evidence, the Coast Guard post-accident report, charts, vessel logs, and other relevant information. He also spoke to a witness and attempted to recreate the collision on a computer. Based upon his investigation, Mr. Green believed that the AUDREY had attempted to pass in front of THE ADMIRAL's tow. During his trial testimony and accompanying video presentation, Mr. Green analyzed a number of possible versions of the collision, confirming his opinion that the AUDREY was at fault in the collision.[9]

3. Independent Witnesses

In addition to the testimony of Mr. Coon, Ms. Jones, and Captain Coyle, the district court heard from witnesses, with no connection to any party, whose testimony was inconsistent with the AUDREY's account of the collision.

Captain Joe Holloway was the relief captain aboard the M/V CITY OF PORT ALLEN. On the morning of the collision he was proceeding west, trailing THE ADMIRAL by approximately one-quarter to one-half mile. He testified that he twice contacted THE ADMIRAL to arrange for his vessel to overtake THE ADMIRAL. On the

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[9] Oddly, the trial judge made no mention of Mr. Green's testimony in his findings. At trial, counsel for the Claimants complained of Mr. Green's failure to consider Ms. Jones's account of the collision in rendering an opinion of the cause of the accident. However, because Ms. Jones's testimony was almost identical to Mr. Coon's testimony, we are not persuaded that this omission bears in any way upon the validity of Mr. Green's opinion.

second request, Captain Coyle advised Captain Holloway not to pass because a shrimp boat had pulled in front of THE ADMIRAL's tow and he was backing THE ADMIRAL down. Captain Holloway testified that for the entire time that he observed THE ADMIRAL, it remained near the center of the channel, consistent with THE ADMIRAL's version of events. This testimony contradicts Mr Coon's testimony and Captain Underhill's theory that THE ADMIRAL moved to starboard and struck the AUDREY near the north bank.[10]

In contrast to Luhr Bros., the Claimants presented no independent fact witnesses supporting their theory of the collision. The Claimants did offer the deposition of Robert Witt, a deckhand aboard THE ADMIRAL, in an attempt to discredit Captain Coyle's story. Mr. Witt's deposition testimony, however, is generally consistent with the version offered by THE ADMIRAL. Specifically, Mr. Witt testified that he was working on the starboard side of the tow when he observed the AUDREY pass approximately 100 feet off the starboard beam. Shortly

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[10] Curiously, similar to Donald Green's testimony, the district court did not mention Captain Holloway or his testimony in its findings.

The only independent witness that the district court did mention was Captain Jimmy Lewis, whom Luhr Bros. had presented as a witness to the collision. Captain Lewis was piloting a tugboat that had been approaching THE ADMIRAL head-on. His testimony was generally consistent with THE ADMIRAL's account of the collision. The district court declined to credit Captain Lewis's testimony because of inconsistencies between his trial testimony and his earlier deposition testimony. A review of the record indicates that the district court was justified in so doing.

thereafter, Captain Coyle called Mr. Witt over the radio to report that a boat was crossing his bow, and Captain Coyle began to blow the danger signal. Mr. Witt immediately looked towards the bow, where he observed the AUDREY crossing the bow of the tow. A second or two later, the AUDREY disappeared behind the rocks piled on the barges, and Mr. Witt began to move to the port side of the tow. As he moved to the port side, he caught a glimpse of the AUDREY from the middle of the barges between the rock piles. Mr. Witt next saw the AUDREY bottom up, coming down the port side of THE ADMIRAL's tow. Thus, Mr. Witt's testimony is consistent with Captain Coyle's version of the accident: the AUDREY cut across the bow of THE ADMIRAL's tow and the port lead barge collided with the AUDREY near the middle of the channel.

4. Implausibility

Finally, we are struck with the facial implausibility of the AUDREY's version of the collision.

Mr. Coon testified that he proceeded to pass THE ADMIRAL's flotilla on its starboard side, approximately 150 feet from the barges. He stated that when he drew even with the stern of the starboard lead barge and the bow of the starboard middle barge, he slowed to the same speed as THE ADMIRAL's flotilla and held this position relative to the barges. Ms. Jones supported this account. However, as Captain Underhill was forced to concede, the collision could not physically have occurred with the

AUDREY and THE ADMIRAL's tow in this relative position as testified to by Mr. Coon and Ms. Jones.[11] It was critical to the AUDREY's version of the collision that the AUDREY collided with the *bow* of THE ADMIRAL's starboard lead barge, rather than some other part of the starboard side of the flotilla. Otherwise the AUDREY could not explain how she was thrust across the bow of the starboard lead barge and collided with the bow of the port lead barge.

Furthermore, it is implausible that not one person aboard the AUDREY saw THE ADMIRAL's tow – piled with rock sitting twelve to fifteen feet out of the water – slowly drifting toward the AUDREY. Yet the AUDREY's witnesses maintained that they had no warning of impending danger until the impact.

Mr. Coon testified as follows:

Q: And you've [sic] navigating with that depth finder and you're looking straight ahead, right?

A: [by Mr. Coon] Right.

Q: You never look over here again, do you? You never saw that tow coming, did you?

A: I looked over there several times.

Q: Every time you looked over there, that tow still looked like it was 50 yards away.

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[11] Captain Underhill was faced with the task of explaining the mechanics of the collision, using Mr. Coon's description of the events. Captain Underhill was unable to do so and stated that Mr. Coon's explanation of the events was "impossible." Captain Underhill then offered his own version of what took place.

A: Every time I looked over there, that tow looked just exactly like it was the first time I looked at it.

Q: Which is 50 yards away?

A: Right.

. . .

Q: Did you see the tow coming, sir?

A: No, sir.

Q: Why not?

A: I don't know why. I really don't know why I never seen [sic] it coming.

Ms. Jones testified similarly:

Q: Now, no one – you said nobody said anything or nobody in the boat ever discussed anything prior to the collision about "the positions of the vessels are closing," "we need to look out," "look out! Something is coming!" Nothing like that was ever said.

A: [by Ms. Jones] No, sir.

Q: And nobody on the AUDREY, to your knowledge, was aware that this tow was drifting to the starboard side?

A: No, sir.

Q: And the only thing you know is that you got hit, and that's the first indication you or anyone else on that boat had that this [sic] six loaded barges had come starboard towards your boat?

A: That's correct.

Mr. Coon also testified that prior to the collision, Mr. Jerome was working at the back of the boat, with a completely unobstructed view behind the AUDREY and to its port and starboard sides. According to Mr. Coon's testimony, Mr. Jerome gave no indication that he noticed THE ADMIRAL's barges closing in on the AUDREY. Moreover, Captain Underhill stated that Mr. Coon and Ms. Jones stood in the best position to maintain a proper lookout. Given these circumstances, we find it implausible that THE ADMIRAL drifted to starboard, and that not one person aboard the AUDREY realized that this ten- to twelve-foot-high wall of crushed rock was on a collision course with the AUDREY until THE ADMIRAL's barge struck the AUDREY. Rather, THE ADMIRAL's version that no collision occurred until the AUDREY crossed the bow of the flotilla is much more plausible.

In view of the sheer implausibility of the AUDREY's account of the collision, the district court committed clear error in accepting this version of the accident.

B.

Based upon the foregoing discussion, we are left with the definite and firm conviction that the physical evidence, the testimony of independent witnesses, and the inconsistency and implausibility of the AUDREY's version of the collision demonstrate that the district court erred in finding THE ADMIRAL solely at fault for this collision. The only evidence to support such a finding is the eyewitness testimony of Mr. Coon and Ms. Jones.

Captain Underhill's testimony, apart from being inconsistent with that of Mr. Coon, is unsupported by the physical evidence and adds no support to Claimant's case. Opposed to that testimony is the testimony of Captains Coyle and Holloway, as well as deckhand Robert Witt's testimony, the physical evidence, and the expert testimony interpreting that physical evidence. The overwhelming weight of credible evidence establishes that the AUDREY, for whatever reason, attempted to cross the bow of THE ADMIRAL's tow and was unsuccessful, resulting in a single impact at the bow of the port lead barge. Mr. Coon's actions in proceeding across the bow of THE ADMIRAL, thereby placing the AUDREY in extremis, was the sole cause of this collision.

Because we agree with Luhr's principal argument on appeal – that the district court committed clear error – we need not address Luhr's remaining arguments challenging the district court's refusal to allow Luhr to limit its liability, the court's valuation of THE ADMIRAL for limitation purposes. and the basis and quantum of the Claimants' damages awards.

IV.

We are ever mindful of our limited role as an appellate court. A corollary to this awareness is the deference given to a district court's factual findings by way of clear error review. However, for the reasons stated above, we are convinced that the district court clearly erred. Because we conclude that the action of the AUDREY was the sole proximate cause of this collision, we REVERSE

the judgment rendered against THE ADMIRAL, and RENDER a take nothing judgment against the Claimants.

REVERSED and RENDERED.

EOD 7-1-97

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

IN THE MATTER OF THE COMPLAINT OF LUHR BROS., INC., AS OWNER, OWNER PRO HAC VICE, OPERATOR AND/OR CHARTERER OF THE M/V THE ADMIRAL, IN A CAUSE OF EXONERATION FROM AND/OR LIMITATION OF LIABILITY, CIVIL AND MARITIME	§	NO. 1:96 CV 0631

Consolidated with

IN THE MATTER OF ESTATE OF ALLEN L. JEROME, OWNER OF THE F/V AUDREY, PRAYING FOR EXONERATION FROM OR LIMITATION OF LIABILITY	§	NO. 1:96 CV 0657 IN ADMIRALTY, PURSUANT TO RULE 9(H) AND SUPPLEMENTAL RULE F OF THE FEDERAL RULES OF CIVIL PROCEDURE

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed 97 Jun 30)

The above-captioned cause came on for trial before the Court without a jury on May 8 and 9, 1997. All parties

and attorneys were present. After considering the pleadings, the evidence, the arguments and briefs from counsel, the Court makes its findings of fact and conclusions of law, pursuant to Rule 52 of the Federal Rules of Civil Procedure. To the extent that any of the following findings of fact constitute conclusions of law, they are adopted as such, and to the extent that any of the conclusions of law constitute findings of fact, they are so adopted.

FINDINGS OF FACT

1.

On April 20, 1996 THE ADMIRAL was owned and operated by LUHR BROS., INC., and under the control of LUHR BROS., INC.'s employee, Captain Michael Coyle, who was in the course and scope of his employment at the time of the subject incident. THE ADMIRAL, pushing six barges, collided with the fishing vessel AUDREY.

2.

As a result of the collision between THE ADMIRAL and the AUDREY, the AUDREY sank in the Sabine-Neches Waterway (territorial water of the State of Texas) resulting in the drowning of Allen L. Jerome and Matthew Marvin Shepp, a minor. Connie Sue Valverde and William Coon, the two remaining persons aboard the AUDREY, sustained personal injuries as a result of the collision.

3.

THE ADMIRAL is a 120' long X 35' wide twin-screw inland riverboat with 2,400 horsepower. Each of the six barges measured 195' X 35'. The total flotilla was 705' X 70'. The value of THE ADMIRAL at the end of its voyage on April 20, 1996 is found to be $1,200,000.00. The value of the F/V AUDREY upon completion of its voyage on April 20, 1996, was $2,000.00.

4.

The F/V AUDREY was owned by Allen L. Jerome, and at the time of the collision William Coon was at the helm with Connie Sue Valverde to his immediate left. Matthew Marvin Shepp was seated to the left of Connie Sue Valverde, and Allen L. Jerome was located near the live bait well at the stern of the boat.

5.

At the time of the collision, THE ADMIRAL was pushing six barges, fully loaded, with a cargo of crushed rock and made up in the configuration of "three long and two wide," or three lengths of barges lashed together two-abreast. 33 C.F.R. 162.5 requires any tow with a width greater than 55' in the Intracoastal Canal to obtain an oversized tow permit. For the movement of oversized barge flotillas, the Coast Guard will grant permission for the tow only if the owner, operator and master acknowledges and accepts the responsibility, liability and obligation to prudently and safely operate the barge flotilla. This includes insuring a clear and free channel is left

open to permit unobstructed navigation by all vessels using the waterway. The oversized tow is the burdened vessel and should yield to the maximum, including disassembling tows, if necessary (Claimants' Exhibit 31 and 32).

6.

Immediately prior to the collision, THE ADMIRAL and the AUDREY were running parallel in the Sabine-Neches Ship Channel, with THE ADMIRAL located approximately 50 yards off to the starboard side of the AUDREY. Prior to the collision, William Coon received no radio communications from THE ADMIRAL (Tr. p. 67). Prior to the collision, the F/V AUDREY maintained its course and speed (Tr. p. 40). Immediately prior to the collision, William Coon did not turn the wheel of the AUDREY to the left causing the vessel to turn sharply to starboard (Tr. pp. 43 and 76).

7.

Captain Coyle on THE ADMIRAL allowed his vessel to drift to his right (toward the west side of the Sabine-Neches Ship Channel) into the AUDREY. The starboard bow of THE ADMIRAL'S lead barge struck the port stern of the AUDREY on a tire used for a bumper. This pushed the AUDREY'S stern to the right knocking the AUDREY into the path of the barges. Immediately upon contact, William Coon pushed the AUDREY'S throttle to full in an attempt to run away from the barges. The attempt was unsuccessful and the AUDREY again was struck, this

time by the port lead barge bow. The AUDREY immediately was capsized and eventually she sank.

8.

Captain Coyle on THE ADMIRAL was in a better position to avoid this collision than William Coon on the AUDREY because Captain Coyle should have been able to look out the front window of his tug and maintain a clear view of the AUDREY. William Coon, conversely, had the disadvantage of having to look back over his left shoulder to see the tug and tow, and his broad view of the walls of iron and rock which made up THE ADMIRAL's tow took away any perspective he would have been able to use to gauge distance and speed.

9.

Captain Coyle did not take proper evasive action to avoid this collision. Captain Coyle testified that he began blowing his danger signal immediately upon seeing the AUDREY turn left in front of the barges pushed by THE ADMIRAL. The deckhand on board THE ADMIRAL, Witt, testified he saw the AUDREY within a second from hearing the danger signal and the AUDREY was already in front of the barges. The Court finds that the AUDREY did not voluntarily make a left turn in front of the barges; rather, the barges drifted to the right and struck the AUDREY before the AUDREY ever saw the barges. It was after this initial contact that Captain Coyle sounded the danger signal and deckhand Witt on THE ADMIRAL

looked up during the moment the AUDREY was attempting to accelerate away from the barges after she had already been struck one time.

10.

The AUDREY was maintained in a good condition (Tr. p. 235). Nothing mechanical or structural caused or contributed to the collision between the AUDREY and THE ADMIRAL (Tr. p. 126). Allen L. Jerome had never previously reprimanded or criticized the navigational skills of William Coon (Tr. p. 126). William Coon was not at fault and was not a proximate cause of the subject collision. The AUDREY was seaworthy in all respects prior to the collision and Allen Jerome was not at fault or a proximate cause of the subject collision.

11.

Prior to the fateful voyage of THE ADMIRAL, THE ADMIRAL picked up her tow in the Intracoastal Waterway at the Thousand Foot Cut in the narrow portion of the Intracoastal Waterway. THE ADMIRAL picked up the oversized tow from another vessel owned and operated by LUHR BROS., INC., THE ROBERT T (Tr. pp. 350-353).

12.

THE ADMIRAL was required to obtain an oversized tow permit prior to leaving the Thousand Foot Cut (Tr. p. 135). There is no record with the U.S. Coast Guard office in Port Arthur, Texas that THE ADMIRAL obtained an oversized tow permit (Tr. p. 134, 135). The failure of THE

ADMIRAL to obtain an oversized tow permit was a statutory violation rendering THE ADMIRAL and LUHR BROS., INC. negligent per se. The burden was on petitioner, LUHR BROS., INC., to establish that this statutory violation could not have been the cause of the subject collision. LUHR BROS., INC. has failed to meet its burden.

13.

The documentation introduced as Exhibit 31 and 32 by the claimants regarding LUHR BROS., INC. and the Captain's assumption of risk when operating oversized tows serves at least two functions. First, it advises the vessel operating company of the seriousness with which the Coast Guard views hazards to navigation imposed by oversized tows. Second, and more important in this case for causation purposes, it reminds the vessel captain that in departing a berth with an oversized tow the captain assumes the liability for the voyage and agrees to use special diligence to avoid impeding the navigation of other vessels.

14.

Captain Coyle partially made up his vessel and got underway while his crew members still were working to add lines securing THE ADMIRAL to her tow, and Captain Coyle was unaware of the heightened level of diligence required by the oversized tow permit which would have avoided this tragedy. Captain Coyle was distracted by crew members working on the deck of his boat to make up additional towing lines, and this, combined with

the flooding tide and stiff winds allowed Captain Coyle to permit THE ADMIRAL and tow to swing to the west side of the Sabine-Neches Ship Channel and strike the AUDREY.

15.

LUHR BROS., INC. failed to establish that had Captain Coyle been made aware of the burdens and liability required in obtaining the oversized tow permit, such awareness on the part of Captain Coyle would not have been sufficient to avoid this collision. LUHR BROS., INC.'s corporate policy is to require a new tug taking over barges from another tug with an oversized tow permit to enter the permit into the vessel log book prior to entering the Intracoastal Waterway and to notify the United States Coast Guard of the transferring of the oversized tow permit. (Claimants' Ex. 37, Depo. of Steven Glenn, corporate representative of LUHR BROS., INC.). However, Captain Coyle was unaware of any company policy against running an oversized tow without a permit from the Coast Guard and has never received any written instruction from LUHR BROS., INC. on obtaining an oversized tow permit (Tr. p. 374). This establishes negligence on the part of LUHR BROS., INC. in failing to properly train and supervise its vessel captains.

16.

In addition to the oversized tow requirements, Captain Coyle and the M/V THE ADMIRAL were in violation of numerous statutes of the United States Code and the Inland Navigation Rules, as promulgated by the

United States Coast Guard, including the following (Claimants' Exhibit 20):

(1) The M/V THE ADMIRAL failed to keep a proper look-out, in violation of 33 U.S.C. 2005, and Inland Navigation Rule 5 (Tr. p. 142, line 21);

(2) The M/V THE ADMIRAL failed to take proper evasive action when the risk of a collision became apparent, in violation of 33 U.S.C. 2008, and Inland Navigation Rule 8 (Tr. p. 146);

(3) Captain Coyle, of the M/V THE ADMIRAL failed to properly keep track of the position of his vessel and tow in relationship to that of the AUDREY, in violation of 33 U.S.C. 2007, and Inland Navigation Rule 7 (Tr. p. 154);

(4) The M/V THE ADMIRAL, as the stand-on vessel, failed to keep her course and speed, failed to take action to avoid collision, failed to proceed at safe speed so that she could take proper and effective action to avoid collision and be stopped within a distance appropriate to the prevailing circumstances and conditions, in violation of 33 U.S.C. 2006, and Inland Navigation Rule 6, 33 U.S.C. 2017, and Inland Navigation Rule 17 (Tr. pp. 137-138); and

(5) The M/V THE ADMIRAL failed to sound the danger signal of five short and rapid blasts on its horn when it failed to understand the intentions or actions of the F/V AUDREY, in violation of 33 U.S.C. § 2034, and in violation of the Inland Navigation Rule 34 (Tr. p. 146).

These violations were proximate causes of the collision and were the result of inadequate policies and procedures on the part of LUHR BROS., INC. to insure its masters operating oversized tows are competent and qualified to handle this hazardous environment.

17.

Although LUHR BROS., INC. does not have written training guidelines, LUHR BROS., INC. allows its captains to devote part of their attention to rigging of the tug and still driving the vessel down the channel with shrimp boats alongside. (Claimants' Ex. 37, Depo. of Steven Glenn, corporate representative of LUHR BROS, INC.) Not only did LUHR BROS., INC.'s corporate management representative with responsibility for training, Stephen Glenn, believe it was perfectly acceptable to operate oversized tows while running alongside pleasure craft while still making up tow lines, but LUHR BROS., INC. introduced no evidence of any policy requiring bow lookouts on oversized tows in area with heavy pleasure traffic.

18.

The collision site is known to be busy with pleasure craft on weekend mornings such as the day of the accident and LUHR BROS., INC. should have required a bow lookout, it should have prohibited operating while still making up the tow, and it should have taken steps to insure its captains did not violate the numerous statutes enumerated above. These statutory violations and failures on the part of LUHR BROS., INC. were proximate causes of the subject collision.

19.

LUHR BROS., INC. maintains no written policy or procedure for the training, hiring, firing, review or to establish the qualifications of personnel who captain their vessels. When Mr. Coyle was promoted to captain, it was solely at the discretion of Steven Glenn, who had never personally ridden on the same vessel as Mr. Coyle. (Claimants' Ex. 37, Depo. of Steven Glenn, corporate representative of LUHR BROS., INC.) LUHR BROS., INC.'s absence of structured procedures to insure competence of its crews was a proximate cause of the subject collision. Captain Coyle had been involved in two prior collisions while operating LUHR BROS., INC.'s vessels, neither of which were documented in Captain Coyle's personnel file. One of the collisions involved a vessel-to-vessel collision while Captain Coyle was at the wheel. The other collision involved strikingly similar circumstances to the AUDREY tragedy. THE ADMIRAL was pushing a six-barge tow of virtually identical dimensions as the subject tow, when wind and current pushed the tow to the right side of the channel causing it to strike a dock causing property damage. Claimants introduced LUHR BROS., INC.'s U.S. Coast Guard report from this allision [sic] which indicates that Captain Coyle was the vessel's master at the time of the allision [sic]. The Coast Guard report does not indicate who was actually manning the helm at the time of the allision [sic], and Captain Coyle testified that he was not actually at the wheel during the incident. He did not specify whether he was in the wheelhouse, however, and this Court presumed that as the master of the vessel he bore ultimate responsibility for that dock allision [sic]. Even if he were not in the wheelhouse, a

finding which this Court does not make, he still would have responsibility for insuring the vessel was operated by a competent master. Steven Glenn, LUHR BROS., INC.'s management representative with responsibility for hiring, promoting and training LUHR BROS., INC.'s captains and pilots, testified that masters make the decision as to whether subordinate personnel are ready to pilot the vessels. Thus, even if Captain Coyle was not at the wheel, this dock allision [sic] when coupled with the prior collision should have been documented in Captain Coyle's personnel file and steps should have been taken to insure Captain Coyle displayed the type of flawless navigation skills required to operate oversized tows in the Intracoastal waterway. At minimum, LUHR BROS., INC. should have discussed the matter with Coyle and personally observed his navigation skills before sending him and his crew back out.

20.

LUHR BROS., INC. failed to take any steps whatsoever to determine Captain Coyle's competence and LUHR BROS., INC.'s failure to have appropriate policies requiring these steps was a proximate cause of this collision. LUHR BROS., INC.'s deficiencies in all the areas enumerated above were within the privity and knowledge of LUHR BROS., INC., the corporate entity, and, as a result, LUHR BROS., INC. is not entitled to any limitation of or exoneration from liability in this case.

21.

LUHR BROS., INC.'s theory of the case was that William Coon voluntarily and suddenly turned left in front of LUHR's oncoming barges. LUHR BROS., INC. attempted to support this theory through the testimony of a tugboat captain who claimed to be in the area, Jimmy Lewis. The testimony of Defendants' witness, Jimmy Lewis, about the accident lacks credibility. The late designation and identification of Jimmy Lewis by LUHR BROS., INC. nine days prior to trial and over one year after the accident is suspicious. Moreover, Lewis's deposition was taken the night before he testified and at trial he directly contradicted his prior testimony on several critical issues. It simply is not plausible that William Coon voluntarily turned into the path of six loaded rock barges. Rather, the great weight of credible evidence established that THE ADMIRAL failed to maintain its course and speed and struck the AUDREY, as described by William Coon and Connie Sue Valverde.

22.

At the time of the collision, Allen L. Jerome and Matthew Marvin Shepp were wearing life jackets (Tr. p. 33). After several moments, the two occupants of the AUDREY without life jackets, William Coon and Connie Valverde, were able to extricate themselves from the vessel and float to the surface. In the moments following the collision, Allen Jerome struggled to free himself from the mess of lines and nets that flooded the wheelhouse area, but he was unsuccessful. Mr. Jerome was found tightly bound by various lines which were pulled taut as a result

of his final struggle for life. Seven-year-old Matthew Marvin Shepp's final moments were equally tragic. Matthew Marvin Shepp was a good swimmer who frequently engaged in recreational sports and knew his way into and out of a life jacket. When the AUDREY capsized he was forced to the deck of the wheelhouse which now was over his head because the water rising toward the deck carried his life jacket upwards. Matthew could have been trapped in an air pocket at the bottom (now the top) of the AUDREY while the AUDREY was sinking, Apparently he slipped out of his life jacket and attempted to swim. Unfortunately, a single line wrapped a single loop around his leg and held him in the AUDREY. He was found without his life jacket with a single line tightly wrapped on his leg. Allen L. Jerome's body was found inside the wheelhouse of the AUDREY entangled in ropes (Tr. p. 214). Matthew Marvin Shepp's body was found in the wheelhouse area with a rope looked [sic] around his left ankle. The entanglements resulted from struggling (Tr. p. 216).

23.

Matthew Marvin Shepp was a happy, well-adjusted seven-year-old boy who was loved by his parents, his teachers, and his friends. He did well in school and loved sports. Apparently his final minutes were spent in fear and darkness struggling for another breath of life. Claimants Connie Valverde and Barry Shepp seek survival damages on behalf of the Estate of Matthew Marvin Shepp and the Court finds that Matthew Marvin Shepp sustained damages for fear, anguish, pain, suffering, and the like in the amount of $300,000.00 prior to his death.

24.

Barry Shepp is entitled to recover wrongful death damages under Texas law for mental anguish, loss of companionship, and loss of society in the amount of $500,000.00. Mr. Shepp was close to his son, he spent every summer and holiday with him, frequently engaging in recreational water sports at a lake house Matthew greatly enjoyed. Mr. Shepp has experienced significant difficulties in dealing with his son's death, including inability to work at times. Mr. Shepp has made numerous unsolicited trips from his home in California to Matthew's gravesite in Beaumont simply to "visit Matthew." Mr. Shepp has taken steps to memorialize his son in California. These are the actions of a sincere father who has endured great pain and, more likely than not, will continue to do so the remainder of his life. The Court finds that an award of $500,000.00 for Mr. Shepp's damages in the past and in the future is reasonable and warranted in this case.

25.

Connie Sue Valverde is entitled to recover damages for the personal injuries she suffered as a direct result of the collision. This includes damages for her pain and suffering, mental anguish associated with her physical injuries, including respiratory difficulties due to water inhalation and hypothermia, as well as multiple cuts, bruises and orthopedic injuries. She sustained medical expenses, funeral expenses, burial expenses and lost wages in the amount of $25,535.81, which were directly caused as a result of the collision. The fear, torment and

anguish she suffered as she desperately struggled to find her missing boy in the darkness of the overturned shrimp vessel is well documented.

Connie Sue Valverde is also entitled to recover wrongful death damages under Texas law for her mental anguish and loss of companionship and society. Ms. Valverde enjoyed a loving and close relationship with her son. As a direct result of the loss of her son she has suffered from severe grief reaction, sleep disturbance, nightmares, depression, withdrawal and symptoms of post traumatic stress disorder. In fact, Ms. Valverde became so despondent and overwhelmed with grief that she attempted suicide to end her emotional suffering. The Court finds that Ms. Valverde has endured great pain and emotional trauma and will continue to do so for the remainder of her life. The Court finds that an award of $1,500.000.00 for Ms. Valverde's damages in the past and in the future is reasonable and is warranted in this case.

26.

William Coon is entitled to recover damages for his personal injuries, including damages for his pain and suffering and mental anguish. His medical expenses in the amount of $2,191.25 were directly caused as a result of the collision. Following the collision, William Coon was disoriented and trapped under the overturned vessel as he gasped for air, swallowed diesel fuel, and struggled for his life. He stood by helplessly as he watched the fishing vessel, AUDREY, sink, knowing his good friend Al Jerome and young Matthew Shepp were stilled [sic] trapped below. He suffered from extreme grief reaction,

depression and post traumatic stress disorder as a result of the accident. The Court finds that an award of $600,000.00 for William Coon's personal injury damages in the past and in the future is reasonable and is warranted in this case.

27.

Audrey Jerome was married to Allen Jerome. At the time of Allen Jerome's death, he and Audrey Jerome owned the M/V AUDREY. The value of the vessel, M/V AUDREY, immediately preceding the collision was $28,000.00. The value of the vessel, M/V AUDREY, after the collision was $2,000.00. Audrey Jerome and the Estate of Allen Jerome were damaged in the sum of $26,000.00 as a result of the collision and sinking of the M/V AUDREY. As a result of the collision, the M/V AUDREY sank in the Intracoastal Canal and was removed by the United States Army Corps of Engineers when Mrs. Jerome was unable to effect its removal. The M/V AUDREY was removed at the expense of the United States Army Corps of Engineers. The reasonable and necessary cost for removal was $86,500.00. Pursuant to the authority granted by Congress and the United States Code, the United States Army Corps of Engineers has now billed and is looking to the Estate of Allen Jerome (and Mrs. Jerome) for reimbursement for the expenses of removal. The Estate of Allen Jerome and Mrs. Jerome have accordingly been damaged in the sum of $86,500.00.

28.

As a result of the collision and subsequent death of Allen Jerome, the Estate incurred the following reasonable and necessary funeral expenses incident to his funeral and burial: Greenlawn Memorial – space value $1,220.00; Levingston Funeral Home – $4,163.00; Greenlawn Interment – $695.00; Kainer Memorials – $595.00, for a total of $6,673.00. LUHR BROS., INC. has stipulated that these sums were reasonable and necessary. This damage of $6,673.00 was directly caused as a result of the collision and loss of Allen Jerome.

29.

Allen Jerome and his wife, Audrey Jerome, lived in Bridge City, Texas, and enjoyed a loving and wonderful relationship. As a result of this collision and subsequent loss, Allen Jerome experienced extreme physical pain and mental anguish in those moments immediately preceding his death. The Court takes note that one does not drown without experiencing the horrors and changes associated with one's lungs filling with water, the terror of attempting to escape from such a circumstance, and the unfulfilled desire for air as one suffocates. The Estate is entitled to recover the sum of $300,000.00 as damages for the conscious mental anguish, pain, and physical pain and suffering that Mr. Jerome experienced preceding his death and in those moments of apprehension preceding his loss of consciousness and that period of time in which he became entangled and was drowned. Mrs. Jerome experienced emotional pain, torment, and bereavement as a result of the loss of her husband and the destruction of

their marital relationship. The damages sustained by Mrs. Jerome for her losses, to-wit: the care, maintenance, support, advice, and counsel that she would otherwise have received as well as the loss of companionship, affection, solace, comfort, society, and assistance that she would have received from her husband in their future had Mr. Jerome not lost his life, in the sum of $1,000,000.00.

* * *

CONCLUSIONS OF LAW

I.

This Court has jurisdiction over this action, pursuant to 28 U.S.C. §1331, in that the Petitioner is bringing this action under Title 46 U.S.C. §181, et seq., as well as 28 U.S.C. §1333, and the general maritime law of the United States.

II.

A corporate shipowner such as LUHR BROS., INC. is entitled to limitation of liability only if it can show that the lack of due diligence is not within its "privity or knowledge." This has been interpreted to mean that the negligence must be that of a managing officer or, more properly, a supervisory employee. A managing officer is anyone to whom the corporation has committed general management or general superintendency of the whole, or a particular part of its business. *The MARGUERITE*, 140 F.2d 491, 494. See also *Coryell v. Phillips (The SEMINOLE)*, 317 U.S. 406, 410-411 (1943).

III.

In order to limit their liability, those at interest with THE ADMIRAL must prove their lack of privity or knowledge. The burden of proof on the issue of privity or knowledge is on LUHR BROS., INC., as the petitioning shipowner. LUHR BROS., INC., as owner of THE ADMIRAL, must prove that they lack privity or knowledge. 46 U.S.C. §83(a); *The M/V HOPERANGE,* 226 F. Supp. 1018 (E.D.La. 1964), aff'd, 345 F.2d 451 (5th Cir. 1965). The negligent conduct and incompetency of Captain Coyle caused the collision with the AUDREY. The navigation and management of THE ADMIRAL rendered THE ADMIRAL unseaworthy. LUHR BROS., INC., with no policy for reviewing, hiring, training or evaluating their personnel, was negligent in failing to assess the competency of Captain Coyle, who had been the Master of THE ADMIRAL when the vessel was involved in two previous accidents involving an oversized tow within a year and a half. The fact that the unseaworthiness can be labeled as an error in navigation does not magically protect the shipowner from liability. *Matter of Techi Navigation,* 513 F.Supp. 148, 158 (E.D.La. 1981); *In Summet Venture Limitation Process,* 406 F. Supp. 962 (M.D.Fla. 1983). LUHR BROS., INC., as the corporate shipowner, has a nondelegable duty to man the ship with a competent crew. *Empire Seafoods, Inc. v. Anderson,* 398 F.2d 204, 210 (2nd Cir) cert. denied, 393 U.S. 983, 89 S.Ct. 449 (1968); *Navegacion Castro Riva v. M.S. Nordholm,* 178 F.Supp. 736, 741, n.19 (E.D. La. 1959), aff'd., 287 F.2d 398 (5th Cir. 1961).

IV.

In order to be entitled to limit liability, an owner such as LUHR BROS., INC. who knowingly violates the statutory regulation has a heavy burden of showing that the violation not only did not cause, but could not possibly have contributed to the disaster. *Rowe v. Brooks*, 329 F.2d 35 (4th Cir. 1964). Where a vessel violates any statutory duty or rule of the road, to exculpate itself from liability it must prove not only that the violation did not cause the collision, but *could not* have contributed to the collision. *The PENNSYLVANIA*, 88 U.S. 125 (1874). The Court concludes that LUHR BROS., INC. did not meet its burden to show that statutory violations could not have caused the collision and therefore LUHR BROS., INC. is not entitled to limit its liability to the value of THE ADMIRAL.

As a result of the sinking of the AUDREY on April 20, 1996, in the Sabine-Neches Waterway, the vessel became an obstruction to navigation. The Army Corps of Engineers has a statutory lien in the amount of $86,500.00 against Audrey Jerome, individually and as Independent Executrix of the Estate of Allen L. Jerome, Deceased, pursuant to the Wreck Removal Act codified in 33 U.S.C. §409, et al. The owner of a vessel sunk in a navigable channel may either raise the vessel himself or seek recovery of the expenses from a party responsible for the sinking. *Tennessee Valley Sand and Gravel Co. v. M/V DELTA*, 598 F.2d 930 (5th Cir. 1979). LUHR BROS., INC. is therefore liable to Audrey Jerome, individually and as Independent Executrix of the Estate of Allen L. Jerome, Deceased, for the costs of removing the AUDREY in the amount of $86,500.00.

VI.

State law remedies for wrongful death are available in federal maritime claims to "nonseafarers" who are injured in state territorial waters. *Yamaha Motor Corp., U.S.A. v. Calhoun,* 116 S.Ct. 619 (1966). State survival statutes may also be utilized. *Yamaha,* supra at 624 (with citations). Audrey Jerome, Individually and as Independent Executrix of the Estate of Allen L. Jerome Deceased; Connie Sue Valverde, Individually and as Representative of the Estate of Matthew Marvin Shepp; Barry Shepp, Individually and as Next Friend and Personal Representative of the Estate of Matthew Marvin Shepp, Deceased; and William Coon were "nonseafarers."

State remedies available in the instant case are:

1. Loss of companionship and society: loss of love, affection, solace, comfort, society, assistance, and sexual relationship that the survivor has suffered since the death and could reasonably have expected to receive in the future. This element includes consortium. See *Missouri Pacific Railroad Company v. Vlach,* 687 S.W. 2d 414 (Tex. App. – Houston [14th Dist.] 1985, writ ref'd n.r.e.); *Whittlesey v. Miller,* 572 S.W. 2d 665 (Tex. 1978).

2. Mental Anguish suffered by the surviving spouse or parent: *Sanchez v. Schindler,* 651 S.W.2d 249 (Tex. 1983); *Moore v. Lillebo,* 722 S.W.2d 683 (Tex. 1986). Grief and bereavement: The emotional pain, torment, and suffering that the spouse or parent would, in reasonable probability, experience from the death. (Mental anguish need not be physically manifested nor need the plaintiff be in the zone of danger to so recover). *Moore,* supra.

Survival damages:

1. Physical pain and mental anguish: Evidence that the deceased victim was conscious and actually experienced pain may be inferred from the circumstances surrounding the death. *Landreth v. Reed*, 570 S.W.2d 486 (Tex. Civ. App. – Texarkana 1978, no writ).

It is well established that the existence of conscious pain and suffering may be established by circumstantial evidence, and further that such suffering may be inferred or presumed as a consequence of severe injuries. "it is not necessary that the existence of physical or mental suffering be proved by direct evidence; such suffering may be presumed in cases where it is the natural consequence of the injury of which the plaintiff complains. Where serious bodily injury has been inflicted, some degree of physical and mental suffering is the necessary result; and in such cases the jury are [sic] authorized, without the direct proof of such suffering, to consider the pain both of body and of mind in assessing the amount of damages." *Green v. Hale*, 590 S.W.2d 123, (Tex. Civ. App. – Tyler 1979, no writ).

Consciousness of approaching death is a proper element to consider in evaluating mental suffering. *Jenkins v. Hennigan*, 298 S.W.2d 905, 911 (Tex. Civ. App. – Beaumont 1957, writ ref'd n.r.e.)

One does not die from drowning without unpleasant changes occurring within the body – the lungs fill with water, for one. The law does not necessarily require direct proof of or specific findings on matters of universal knowledge. As Judge Slayton said in *Texas & P. Ry. Co. v. Curry*, 64 Tex 85 (1885): The law infers, when such injuries

to the person are shown to have existed as are alleged and proved in this case, that physical pain resulted therefrom; for by common observation we know that in the ordinary operation of natural laws, pain is a necessary result of such injuries. This is equally true as mental suffering; for it is contrary to common experience and the laws of man's existence and nature that any person by physical injuries may be made a cripple . . . without mental pain resulting from the changed condition. *City of Austin v. Selter*, 415 S.W.2d 489 (Tex. Civ. App. – Austin 1967, writ ref'd n.r.e.).

In a collision, a decedent is entitled to recover for mental anguish suffered from the moment of apprehension of the apparent calamity until loss of consciousness, cf: *General Motors Corp. v. Saenz*, 829 S.W. 2d 230 (Tex. Civ. App. – Corpus Christi 1991), reversed on other grounds 873 S.W. 2d 353 (Tex. 1993): Where the decedent was conscious while his truck careened out of control and became unstable and crashed – extreme fear and shock at the instant of the blowout caused the impending awareness of severe injury or death; *Yowell*, supra at 634; where the Supreme Court held that an award for mental anguish suffered between airplane breakup and ground impact belonged to the estate of deceased.

2. Medical expenses: *Monsanto Co. v. Johnson*, 675 S.W.2d 305 (Tex.App. – Houston [1st Dist.] 1984) writ ref'd per curiam, 696 S.W. 2d 558 (Tex. 1985).

3. Funeral and burial expenses: Reasonable and necessary funeral and burial expenses are recoverable. *Landers v. B.F. Goodrich Co.*, 369 S.W.2d 33 (Tex. 1963); *Monsanto Co.*, supra.

4. Property damages: Property damages sustained by the deceased victim as a result of the incident are recoverable. *Landers,* supra.

VII.

The Court concludes that the claimants are entitled to recover damages set forth in the findings of fact above. The Court finds and concludes that LUHR BROS., INC., through its agents and officers, was negligent and that this negligence proximately caused the damages sustained by Audrey Jerome, individually and as Independent Executrix of the Estate of Allen L. Jerome, Deceased; William Coon; Barry Shepp, Individually and as Next Friend and Personal Representative of the Estate of Matthew Marvin Shepp, Deceased; and Connie Sue Valverde, Individually and as Representative of the Estate of Matthew Marvin Shepp, Deceased.

VIII.

The Court concludes that LUHR BROS., INC. is not entitled to limit liability to the value of THE ADMIRAL and court costs are to be taxed against LUHR BROS., INC. Furthermore, the Court finds and concludes Audrey Jerome, individually and as Independent Executrix of the Estate of Allen L. Jerome, Deceased; William Coon; Barry Shepp, Individually and as Next Friend and Personal Representative of the Estate of Matthew Marvin Shepp, Deceased; and Connie Sue Valverde, Individually and as Representative of the Estate of Matthew Marvin Shepp, Deceased, are entitled to and hereby awarded both pre-

judgment and post-judgment interest to be calculated pursuant to 28 U.S.C. §1961.

SIGNED this 30 day of June, 1997.

/s/ Joe J. Fisher
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-40841

D.C. Docket No. 1:96-CV-657
1:96-CV-631

IN THE MATTER OF THE COMPLAINT OF LUHR BROS INCORPORATED, as Owner, Owner Pro Hac Vice, Operator and/or charterer of the M/V The Admiral, in the Cause of Exoneration from and/or Limitation of Liability, Civil and Maritime

Plaintiff

LUHR BROS INCORPORATED

Petitioner – Appellant

v.

BARRE SHEPP; WILLIAM COON; MATTHEW M SHEPP, Estate of; AUDREY JEROME; ALLEN JEROME, Estate of; CONNIE SUE VALVERDE, Individually and as representative of the estate of Matthew Marvin Shepp, deceased

Claimants – Appellees

THE ESTATE OF ALLEN L JEROME, OWNER OF THE F/V AUDREY, Praying for Exoneration from or Limitation of Liability

Plaintiff

LUHR BROS INCORPORATED

Claimant – Appellant

v.

BARRE SHEPP; WILLIAM COON; CONNIE SUE VALVERDE, Individually and as representative of the estate of Matthew Marvin Shepp, deceased; MATTHEW M SHEPP, Estate of

Claimants – Appellees

Appeal from the United States District Court for Eastern District of Texas, Beaumont.

Before WISDOM, KING, and DAVIS, Circuit Judges.

JUDGMENT

(Filed Sept. 30, 1998)

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is reversed, and a take nothing judgment against the Claimants is rendered.

IT IS FURTHER ORDERED that claimants-appellees pay to appellant the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: NOV 13 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

IN THE MATTER OF THE COMPLAINT OF LUHR BROS., INC., AS OWNER, OWNER *PRO HAC VICE*, OPERATOR AND/OR CHARTERER OF THE fl/V THE ADMIRAL, IN A CAUSE OF EXONERATION FROM AND/OR LIMITATION OF LIABILITY, CIVIL AND MARITIME	§	NO. 1:96CV0631

CONSOLIDATED WITH

IN THE MATTER OF ESTATE OF ALLEN JEROME, OWNER OF THE F/V AUDRY, PRAYING FOR EXONERATION FROM OR LIMITATION OF LIABILITY	§	NO. 1:96CV0657

FINAL JUDGMENT

(Filed June 30, 1997

BE IT REMEMBERED that on the 8th and 9th days of May, 1997, this matter was tried by this Court without a jury. All parties were present and represented by their

counsel of record. The Court, having considered the testimony and evidence adduced by the parties, and the briefs and arguments presented by their counsel, is of the opinion that the negligence of Luhr Bros., Inc., as owner, owner pro hac vice, operator and/or charterer of the M/V THE ADMIRAL proximately caused the injuries and damages of the claimants as more fully discussed in the Findings of Fact and Conclusions of Law entered in this matter.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Findings of Fact and Conclusions of Law entered by this Court on the 30 day of June, 1997, are hereby incorporated by reference as if stated fully herein and are adopted as the Findings of Fact and Conclusions of Law by this Court.

IT IS FURTHER ORDERED that judgment is rendered for claimants against Luhr Bros., Inc., as owner, owner pro hac vice, operator and/or charterer of the M/V THE ADMIRAL as follows:

Judgment for Connie Sue Valverde in the amount of One Million Five Hundred Twenty-seven Thousand Two Hundred and Fifty-nine Dollars and Twenty-three Cents ($1,527,259.23). This amount includes pre-judgment interest at the legal rate of 5.65% on Connie Valverde's damages for medical, funeral, burial expenses and lost wages she has incurred in the past in the amount of Twenty Five Thousand Five Hundred Thirty-five Dollars and Eight-one Cents ($25,535.81).

Judgment in favor of the estate of Matthew Marvin Shepp in the amount of Three Hundred and Twenty Thousand Two Hundred and Forty-seven Dollars

($320,247.00) which includes pre-judgment interest at the legal rate of 5.65%.

Judgment for William Coon in the amount of Six Hundred and Two Thousand Three Hundred and Thirty-nine Dollars and Fourteen Cents ($602,339.14). This amount includes pre-judgment interest at the legal rate of 5.65% on Two Thousand One Hundred and Ninety-one Dollars and Twenty-five Cents ($2,191.25) which are the medical expenses incurred by William Coon in the past.

Judgment for Berry Shepp in the amount of Five Hundred Thousand Dollars ($500,000.00).

Judgment for Audrey Jerome in the amount of One Million One Hundred Twenty-seven Thousand Two Hundred and Sixteen Dollars ($1,127,216.00). This amount includes interest at the legal rate of 5.65% on One Hundred and Nineteen Thousand One Hundred and Seventy-three Dollars ($119,173.00) which represents the funeral and burial expenses, the damage to and cost to remove the M/V AUDREY which have been incurred in the past.

Judgment for the estate of Allen L. Jerome in the amount of Three Hundred and Twenty Thousand Two Hundred and Forty-seven Dollars ($320,247.00). This amount includes pre-judgment interest at the legal rate of 5.65%.

All costs are taxed against Luhr Bros., Inc., as owner, owner pro hac vice, operator and/or charterer of the M/V THE ADMIRAL.

SIGNED the 30 day of June, 1997.

/s/ Joe J. Fisher
UNITED STATES
DISTRICT JUDGE

July 1, 1997

Re: 1:96-cv-00631

Notice sent to:
Craig Victor Depew
David Arthur Brandom
Richard Glenn Lewis
Randall DeWayne Collins
Frederick William Mahley

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-40841

IN THE MATTER OF THE COMPLAINT OF LUHR BROS INCORPORATED, as Owner, Owner Pro Hac Vice, Operator and/or charterer of the M/V The Admiral, in the Cause of Exoneration from and/or Limitation of Liability, Civil and Maritime

Plaintiff

LUHR BROS INCORPORATED

Petitioner-Appellant

v.

BARRE SHEPP; WILLIAM COON; MATTHEW M SHEPP, Estate of; AUDREY JEROME; ALLEN JEROME, Estate of; CONNIE SUE VALVERDE, Individually and as representative of the estate of Matthew Marvin Shepp, deceased

Claimants-Appellees

THE ESTATE OF ALLEN L JEROME, OWNER OF THE F/V AUDREY, Praying for Exoneration from or Limitation of Liability

Plaintiff

LUHR BROS INCORPORATED

Claimant-Appellant

v.

BARRE SHEPP; WILLIAM COON; CONNIE SUE VALVERDE, Individually and as representative of the

estate of Matthew Marvin Shepp, deceased;
MATTHEW M SHEPP, Estate of

Claimants-Appellees

Appeal from the United States District Court for the Eastern District of Texas, Beaumont

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(Filed Nov. 4, 1998)

ON PETITION FOR REHEARING

Before WISDOM, KING, and DAVIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
United States Circuit Judge

REHG-2

Supreme Court, U.S.
FILED
MAR 4 1999
CLERK

No. 98-1227

In The

Supreme Court of the United States

October Term, 1998

CONNIE SUE VALVERDE JONES, *et al.*,

Petitioners,

vs.

LUHR BROS., INCORPORATED,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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13pp

RULE 29.6 NOTATION

Luhr Bros., Inc. has no parent corporation nor any nonwholly owned subsidiaries.

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

ARGUMENT 2

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Amstar Corp. v. Dominos Pizza, Inc., 615 F.2d 252 (5th Cir.), *cert. denied*, 449 U.S. 899 (1980) 9

Anderson v. Bessemer City, 470 U.S. 564 (1985) 7

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) 2

Lewis v. Parish of Terrebonne, 894 F.2d 142 (5th Cir. 1990) 6

Randolph v. Laeisz, 896 F.2d 964 (5th Cir. 1990) 6

United States v. United States Gypsum Co., 333 U.S. 364 (1948) 9

RULE OF CIVIL PROCEDURE

FED.R.CIV.P. 52(a) 10

STATEMENT OF THE CASE

Respondent Luhr Bros., Inc. accepts the statement of the case as set out in the Petition for Writ of Certiorari as a reasonably accurate (if somewhat argumentative) characterization of the nature of the case. However, other pertinent factual matters are set out in the argument below. Respondent would show that the court of appeals conducted a review of the record in this case in accordance with the applicable clearly erroneous standard and appropriately concluded with the conviction that the district court clearly erred and that the evidence conclusively established that the fault of Petitioners' vessel, the *AUDREY*, was the sole proximate cause of this maritime collision. Accordingly it reversed the district court's judgment for Petitioners and rendered judgment in favor of Respondents.

Additionally, Respondent would point out that other issues which were before the court of appeals – including issues as to Respondent's entitlement to limitation of liability, the amount of the limitation fund, and the basis and quantum of certain elements of damages awarded to Petitioners by the district court – were not decided by the court of appeals because of its conclusion that Respondent was entitled to exoneration from liability under the circumstances of this maritime collision case. None of these issues is addressed in the Petition for Writ of Certiorari, and therefore presumably would not be before the court even if certiorari were granted.

ARGUMENT

The disposition of this maritime collision case by the court of appeals had nothing to do with the scientific validity or reliability of expert testimony, nor was any issue presented in the courts below at any stage concerning the admissibility of an expert's scientific testimony or evidence, as was the issue considered by this court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Rather, the court of appeals rendered judgment for Respondent after determining from its review of the record evidence as a whole that the district court's determination of the cause of the collision was based upon fact findings which were clearly erroneous. As a brief overview of the evidence will demonstrate, there is no *Daubert* issue present in this case, and the court of appeals correctly and justly applied the "clearly erroneous" standard of review in sustaining Respondent's contention that the district court committed clear error in its findings of fact in this case.

The court of appeals held that the district court's essential finding – that the collision was caused by *THE ADMIRAL* permitting its tow to drift to starboard and strike the *AUDREY* broadside with the headlog of its starboard lead barge – was so against the evidence as to be manifestly wrong. This was not a simple issue as to the credibility of any individual witness or the effect to be given any particular aspect of the evidence. Rather, the court of appeals determined that the overwhelming weight of the evidence, testimonial and circumstantial, was that the collision occurred due to the *AUDREY* turning suddenly across the bow of the tow so that the tug and tow could not avoid the collision.

In its findings of fact, the district court not only rejected the eyewitness testimony – including that of two disinterested witnesses – that the tow never veered off its course near the center of the canal. It also ignored the post-collision physical evidence of the damage to the barges and to the *AUDREY*, which indicated that contact occurred only on the port side of the lead barge in the port string of the tow. It further ignored the uncontroverted expert testimony that the *AUDREY* could not possibly have gotten around to sink where it did, in the middle of the channel on the port side of the tow, if it had been struck broadside near the starboard edge of the canal.

Not only was there no direct evidence that *THE ADMIRAL* ever varied from its straight-ahead course down the center of the canal or at any time canted its tow to starboard, but also two independent witnesses, both licensed masters operating their own vessels in the vicinity of the incident, who had views from ahead of the tow and behind the tow respectively, testified that the tow never veered off course right up to the time of the collision. Further, one of the witnesses, who had a clear view of the scene, corroborated the testimony of the master of *THE ADMIRAL* that the *AUDREY* turned suddenly in front of *THE ADMIRAL*'s lead barges. In its findings, the district court rejected all the eyewitness testimony, characterizing one of the independent witnesses as not credible and ignoring the other entirely.

The hydrodynamic implications of a collision occurring as envisioned by the district court's findings was a subject addressed by an expert witness for Luhr Bros., Donald J. Green, a retired Coast Guard officer with fifteen

years of service in the marine safety arm of that agency, and a licensed master for vessels up to 1,600 tons. Green pointed out that if the starboard headlog of the lead barge in the starboard string of the tow had struck the *AUDREY* broadside, the *AUDREY* would have flattened out against the side of that barge. In that event, the *AUDREY* either would have been pushed aground out of the channel along with the tow, or else it would have rolled under the tow at that point. He said this was so because the pressure of the tow and the undercurrent in front of it would have the effect of pinning the *AUDREY* to the lead barge at the point of impact. Under the circumstances, there is no way the *AUDREY* could have escaped from its position at the alleged point of impact, continued across the bow of the tow, and gotten around to the middle of the channel where it sank after the collision. Green also noted that *THE ADMIRAL*'s barges would have run aground outside the channel if the tow had approached toward the right descending bank at such an angle as to collide with the *AUDREY* within twenty-to-fifty feet of the edge of the navigable channel (the location of the collision according to the testimony of Petitioners Coon and Jones). Petitioners offered no expert testimony to dispute Green's opinion on these matters. The district court's findings simply ignore this uncontroverted expert testimony.

Moreover, the district court's findings do not address the effect to be given to the physical evidence. The obvious indication of the post-collision hull damage to the vessels is that the *AUDREY* was crossing the head of the tow from starboard to port when the collision occurred. While Petitioners Coon and Jones asserted that

their boat was struck by the starboard bow corner of the starboard lead barge in *THE ADMIRAL*'s tow, they could not testify to this as a fact because admittedly they were paying no attention to and did not see the barges before the collision. As a matter of fact, however, there was no evidence of any impact or collision damage on that barge. Two marine surveyors, who conducted separate damage surveys of the barges in *THE ADMIRAL*'s tow after the incident, found damage and paint scrapings consistent with a collision with the *AUDREY* only on the *port* side of the lead barge in the *port string* of the tow.

The evidence as to the hull damage is also quite consistent with the indisputable fact that after the collision the *AUDREY* sank off the *port* side of *THE ADMIRAL*'s tow in the middle of the channel. The district court's findings do not explain logically how the *AUDREY* could have been rammed by the starboard side of the tow near the edge of the channel and thereafter sunk on the other side of the tow in the middle of the channel.

It is correct that several of the district court's fact findings were based upon the theory offered by Petitioners' expert witness, R. J. Underhill, to the effect that wind and current conditions moved the tow to starboard. and caused it to collide with the *AUDREY*. For instance, the district court found that the wheel man of *THE ADMIRAL*, Captain Coyle, "was distracted by crew members working on the deck of his boat to make up additional towing lines, and that this, combined with the flooding tide and stiff winds allowed Captain Coyle to permit *THE ADMIRAL* and tow to swing to the west side of the Sabine-Neches Ship Channel and strike the

AUDREY." [Petition, App. 32-33] Underhill testified that the wind was gusting from the southeast at about twenty knots, blowing on the forward quarter of the tow, and that the current was running at two knots coming out of Sabine Lake and up the canal, but he admitted that such wind conditions would have "not very much" effect on a six-barge flotilla loaded with tons of rock, and he offered no explanation as to how the tow's heading would be affected by the current. Two other witnesses who are licensed and experienced tug pilots (as Underhill, a marine surveyor by profession, is *not*) testified that the current had no effect on their tows at the time and place of the subject occurrence. Additionally, when asked what evidence he had that Coyle was "distracted" so as to permit his tow to drift to starboard, Underhill stated that he had nothing more to go on for this than the mere fact of the collision with the *AUDREY*. This is obviously circular reasoning in which the premises feed upon the conclusion. Although an expert may give an opinion on a particular matter within the scope of his expertise, that opinion must be preceded by facts in evidence, and it cannot be based simply on speculation or conjecture. *Lewis v. Parish of Terrebonne*, 894 F.2d 142, 146 (5th Cir. 1990); *Randolph v. Laeisz*, 896 F.2d 964, 967-968 (5th Cir. 1990).

The district court's fact findings otherwise relied solely upon the inferences to be drawn from the testimony of Petitioner Coon, the *AUDREY*'s pilot, and Petitioner Jones, who was standing next to him in the wheelhouse of their boat. In effect, the trial court's credibility choices result in the rejection, as unworthy of belief, of the testimony of every eyewitness who claimed

to have seen what happened, as well as a rejection of post-collision physical evidence, in order to construct a scenario based solely upon the insistence of Petitioners Coon and Jones that the *AUDREY* never turned in front of the tow.

As the court of appeals aptly pointed out, even crediting the testimony of Coon and Jones insofar as it goes, it could not be explained why no one aboard the *AUDREY* ever noticed any change in the relative position or proximity of the vessels at any time prior to the collision. Since at the outset the barges were no more than fifty yards off the port side of the *AUDREY*, according to the testimony of Coon and Jones, any change in the attitude of the 600-foot long tow of barges, all loaded ten-to-twelve feet high above their decks with rock, should have been readily discernable to the passengers of the relatively diminutive fishing vessel. According to their testimony, Coon and Jones both had a clear view of the barges at all times from the *AUDREY*'s wheelhouse, and Allen Jerome (the owner of the *AUDREY*) was on the open rear deck of the boat tending to the bait tanks, where he had an unobstructed view in all directions. Nonetheless no one aboard the *AUDREY* saw anything or gave any warning prior to the collision, according to the testimony of Coon and Jones. Asked why he did not see the tow coming, Coon testified: "I don't know why. I really don't know why I never seen it coming." As this court stated in *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985):

> [F]actors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story; or the story itself

> may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it. Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility determination.

Even Underhill, in his testimony as an expert for the Petitioners, found Coon's version of the collision incredible because it founders on the look-out issue. Underhill testified that he could not imagine how the collision could have occurred if the *AUDREY* was traveling parallel to the tow in a position between the first and second barges in the string, as Coon testified. Regarding Coon's testimony as to the position of the *AUDREY*, Underhill stated: "How is he going – if he is that far behind – when that tow starts coming over him, what is he doing, sitting there twiddling his thumbs? He's keeping a lookout. He would have seen them." He stated that if the *AUDREY* was in the position that Coon testified it was, and the tow started angling over toward the *AUDREY*'s position, that should have been plainly within Coon's field of vision. In that situation, Underhill agreed that it would be almost impossible to believe that Coon would not have seen the barges closing the distance toward the *AUDREY*.

The expert testimony on this crucial point was all to the same effect. Green stated that there was no reason why it would not be apparent to the wheel man on the *AUDREY* if *THE ADMIRAL*'s tow were closing the distance between the vessels. He pointed out that if the pilot of the *AUDREY* had observed this happening, the collision could readily have been avoided, either by applying a full throttle that would have increased the forward

speed of the *AUDREY* to go ahead out of the way of the barges, or else by throttling down or stopping the *AUDREY*'s engines, thereby allowing the tow time and clearance to continue past while maintaining a safe distance from the barges. Given these immutable circumstances, it was apparent to the court of appeals that Underhill simply contrived an alternative scenario which had no support in the evidence.

Findings of fact are clearly erroneous, even when supported by some evidence, if "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). It is appropriate for the court of appeals to reverse "when the result of a particular case does not reflect the truth and the right of the case." *Amstar Corp. v. Dominos Pizza, Inc.*, 615 F.2d 252, 258 (5th Cir.), cert. denied, 449 U.S. 899 (1980). The court of appeals concluded after reviewing the evidence as a whole that the only explanation of this collision which is consistent with the physical evidence, stands to reason, and is corroborated by disinterested witnesses, is the failure of the *AUDREY* to safely and properly execute its overtaking of *THE ADMIRAL*'s tow, placing itself *in extremis* by making a sharp turn to port in an effort to cut too closely across the bow of the tow. Considering the evidence as a whole, the court of appeals stated that it was "left with the definite and firm conviction" that the district court committed clear error in finding *THE ADMIRAL* at fault in this collision. [Petition, App. 24] This conclusion was not the result of the court of appeals giving "extra weight" to the testimony of any particular witness, nor was it the result of a *de novo*

review of the evidence inconsistent with the "clearly erroneous" standard. Rather it was correct application of the clearly erroneous standard of FED.R.CIV.P. 52(a), as construed by this court.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari does not present an issue which is appropriate for review by this court, and the petition should be denied.

Respectfully submitted,

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